



REPORT OF THE SPECIAL COMMITTEE ON
IMMIGRATION REPRESENTATION

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New York State Bar Association

Special Committee on Immigration Representation

Jojo Annobil, Esq.
Co-Chair
The Legal Aid Society
New York

Joanne Macri, Esq.
Co-Chair
New York State Defenders Association
Albany

Jan H. Brown, Esq.
**Co-Chair, Subcommittee on Standards
and Quality**
Law Offices of Jan H. Brown, PC
New York

Alina Das, Esq.
**Co-Chair, Subcommittee on Standards
and Quality**
Washington Square Legal Services, Inc.
New York

Walter Hammele Ruehle, Esq.
**Chair, Subcommittee on Underserved
Areas of Upstate New York**
Legal Aid Society of Rochester
Rochester

* * *

Jun Hwa Lee, Esq.
Advisor
Appellate Division, First
Department
New York

**Karen L. Murtagh-Monks,
Esq.**
Advisor
Prisoners' Legal Services
Albany

Caren Brett Shannon, Esq.
Advisor
Fragomen, Del Rey, Bernsen &
Loewy, LLP
New York

Prof. Teresa A. Miller, Esq.
Advisor
University at Buffalo
Buffalo

* * *

Nicole R. Abruzzo, Esq.
Bibicheff & Associates PC
Brooklyn

Julie E. Dinnerstein, Esq.
Sanctuary For Families
Bronx

Kimberly Finnigan, Esq.
Cooper Erving & Savage LLP
Albany

Janet E. Sabel, Esq.
Office of the Attorney General
New York

Andria L. Bentley, Esq.
NYSBA Staff Liaison
Albany

Anne E. Doebler, Esq.
Anne E Doebler, PC
Suite 1800
Buffalo

Timothy W. Hoover, Esq.
Phillips Lytle LLP
Buffalo

Diana Sagorika Sen, Esq.
LatinoJustice PRLDEF
New York

**Fernando A. Bohorquez, Jr.,
Esq.**
Baker & Hostetler LLP
New York

Matthew Stuart Dunn, Esq.
Kramer Levin Naftalis &
Frankel LLP
New York

Deborah Ann Kaplan, Esq.
Avon Products, Inc.
New York

Alena Shautsova, Esq.
Anthony Colleuori &
Associates, PLLC
Melville

Olivia L. Cassin, Esq.
The Legal Aid Society
New York

**Henry Raymond Fasano,
Esq.**
Youman, Madeo & Fasano
New York

Allen E. Kaye, Esq.
Office of Allen E. Kaye, PC
New York

**Barbara Elisabeth Weiner,
Esq.**
Empire Justice Center
Albany

Robert I. Cisneros, Esq.
Empire Justice Center
White Plains

Sophie Feal, Esq.
Erie County Bar Association
Volunteer Lawyers Project,
Inc.
Buffalo

David A. Lewis, Esq.
Hinshaw & Culbertson LLP
New York

Stephen W. Yale-Loehr, Esq.
Miller Mayer LLP and Adjunct
Professor, Cornell Law School
Ithaca

Anthony J. Colleluori, Esq.
Anthony Colleluori &
Associates, PLLC
Melville

Hon. Margaret J. Finerty
Getnick & Getnick
New York

David W. Meyers, Esq.
Meyers & Meyers, LLP
Albany

Raluca Viorica Oncioiu, Esq.
Catholic Charities
New York

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Introduction*

“The immigrant representation crisis is a crisis of both quality and quantity.”¹

Immigration representation is in a state of crisis. The liberty interest at stake for many immigrants who face civil immigration detention, removal and likely permanent expulsion from the United States is often undermined by the lack of available competent counsel necessary to navigate through the “labyrinthine character of modern immigration law.”² Recognizing the need to promote access to justice for all, the New York State Bar Association President, Vincent E. Doyle III, created a Special Committee on Immigration Representation to address the dearth of adequate legal representation available in New York State.

The 1996 amendments to U.S. immigration laws (the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132 on April 24, 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208 on September 30, 1996) have contributed significantly to the current crisis in immigration representation. The 1996 amendments, which imposed draconian consequences on unsuspecting immigrants, have made the provision of competent legal representation an overwhelming and daunting task. Faced with the challenges of navigating the notoriously opaque Immigration and Nationality Act (such as determining the immigration consequences of a criminal conviction),³ relatively few attorneys can devote the time necessary to develop an adequate understanding of the consequences imposed on unsuspecting noncitizens, including lawful permanent residents. Consequently, the 1996 immigration amendments have widened the cavernous gulf between immigration practice and notions of due process and equal protection.

To compound this crisis, the stakes involved in immigration matters are often very high and include life-altering experiences such as civil detention, removal and permanent expulsion from the United States. Nonetheless, there continues to be no statutory right to appointed counsel in immigration proceedings. A vast majority of noncitizens cannot

* The Special Committee on Immigration Representation thanks Hon. Robert A. Katzmann and Hon. Denny Chin, United States Circuit Judges for the U.S. Court of Appeals for the Second Circuit, for their outstanding support and leadership, not only in shedding light on problems related to the availability and quality of representation, but also in working to find a resolution to the crisis. We also acknowledge and thank Hon. Noel Brennan of the New York Immigration Court and Hon. Roger Sagerman, who presides over the Institutional Hearing Program at Downstate Correctional Facility, for their tremendous contributions to this report and the invaluable insight they offered the committee.

¹ See The New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, *New York Immigrant Representation Report: Part I*, 33 *Cardozo L. Rev.* 357, 358 (2011) [hereinafter *The New York Immigrant Representation Study*], available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

² *Id.* at n.3 (quoting *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal quotation marks omitted)).

³ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488-90 (2010) (concurrence of Alito, J., providing numerous examples of why “nothing is ever simple with immigration law”); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (comng the complexity of immigration law to the Internal Revenue Code and the mythical labyrinth of King Minos).

afford to retain adequate legal services and are ill-equipped to know where to turn for help or how to proceed *pro se* in an immigration matter. Language issues, limited English proficiency and cultural barriers leave many immigrants further vulnerable to exploitation by unscrupulous individuals who often exact exorbitant fees to provide inadequate, unlawful and/or incompetent representation. In some instances, the assistance provided will do more harm than good, often resulting in the referral of an unsuspecting immigrant for removal proceedings.

A recent study by the Katzmann Immigrant Representation Study Group, led by United States Second Circuit Court of Appeals Judge Robert A. Katzmann, found that having legal representation is one of the two most important variables in obtaining a successful outcome in an immigration proceeding.⁴ Unfortunately, there is insufficient legal representation in many areas throughout New York State and, when an attorney is involved, there are often complex legal issues that require specialized knowledge necessary to provide proper assistance and legal representation.

Although this Special Committee has spent several months studying the problem of adequate immigration representation and has proposed solutions to improve both the quality and quantity of immigration representation in New York State, we recognize that, our Sisyphus-like efforts are unlikely to yield significant results unless there is legislative reform and a statutory right to counsel in immigration proceedings. The Special committee remains committed to improving the quality of representation to ensure that “‘justice for all’ [is] not just a slogan but a reality.”⁵

⁴ See The New York Immigrant Representation Study, *supra* note 1.

⁵ NYSBA, *Free Legal Clinics Free Legal Clinics and Attorney Recruitment Drive Highlight National Pro Bono Week in New York*, (Oct. 21, 2011) (quoting NYSBA President, Vincent E. Doyle III, at http://www.nysba.org/AM/Template.cfm?Section=President_s_Page_Doyle&template=/CM/ContentDisplay.cfm&ContentID=56104).

Executive Summary

The increase in immigration enforcement, coupled with the acute shortage of competent immigration attorneys, has resulted in a crisis in immigration representation that prompted the New York State Bar Association President, Vincent E. Doyle III, to convene the Special Committee on Immigration Representation (Special Committee). In May 2011, the Special Committee was mandated to address some of the complex issues involved in providing competent immigration representation, to study the challenges presently facing respondents, attorneys and the courts, and to suggest some possible solutions.

With invaluable input from immigration judges, immigration advocates, accredited representatives, government officials and attorneys from a variety of different legal disciplines, including immigration law, the Special Committee has prepared the following report and recommendations to improve the quality and availability of legal representation and to ensure that immigrants, especially those of low income, have access to competent immigration assistance throughout New York State.

The Special Committee's report was accomplished through the creation of two subcommittees: "Standards and Quality of Representation" and "Meeting the Unmet Needs of the Underserved Immigrant Population in Upstate New York."

Subcommittee on Standards and Quality:

a) Standards of Representation of Clients in Immigration Cases

Concerns about the poor quality of representation in immigration matters have been discussed in different fora for many years. The publication in December 2011 of a survey conducted of New York immigration judges by the New York Immigrant Representation Study raised renewed concerns about the quality of representation in immigration court proceedings. Surveyed judges rated the representation provided by 33% of attorneys who appeared in immigration court as "inadequate" and 14% as "grossly inadequate."⁶ The Special Committee, in recognizing the importance of quality of representation, has proposed minimum standards of representation for attorneys and non-attorneys accredited by the Executive Office for Immigration Review (EOIR), Board of Immigration Appeals (BIA) (referred to as "accredited representatives"), who provide legal representation in immigration matters. The proposed standards codify longstanding and approved practices and norms and would serve as a practical guide for all attorneys and accredited representatives who provide critical immigration representation. Although not binding, the proposed standards would complement the New York Rules of Professional Conduct and the Executive Office for Immigration Review's Professional

⁶ The New York Immigrant Representation Study, *supra* note 1, at 391.

Conduct for Practitioners,⁷ and are necessary to protect immigrants and ensure a fair and efficient immigration process.

b) Board of Immigration Appeals' Recognition and Accreditation Process

Additionally, given the lack of adequate attorney resources in many parts of the country (including vast areas of upstate New York), the subcommittee recognizes that the Executive Office for Immigration Review (EOIR) Recognition and Accreditation Program provides valuable immigration representation services to low income immigrants. The program allows non-attorneys affiliated with recognized not for profit organizations to provide immigration representation at a nominal fee. However, the subcommittee also recognizes that the current program fails to ensure adequate training of the accredited representatives and regular oversight of the recognized organizations. This subcommittee has therefore proposed recommendations for consideration by the EOIR to ensure a more effective Recognition and Accreditation Program. If implemented, the proposed recommendations will ensure not only an increase in the availability of representation, but also an improvement in the quality of legal assistance provided to low-income and indigent immigrants across the country.

Subcommittee on Underserved Areas of Upstate New York:

Recognizing that the “current demand for indigent removal-defense in New York exceeds the supply of such services,”⁸ and that increased immigration enforcement is only likely to worsen the situation for detained immigrants, this subcommittee is exploring viable avenues to resolve the acute shortage of attorneys providing *pro bono* immigration representation in upstate New York. In its report, the subcommittee provides an in-depth view of the Institutional Removal Program (IRP), a collaboration between the New York State Department of Corrections and Community Services, the Executive Office for Immigration Review and Immigration and Customs Enforcement. The subcommittee report also reviews the current state of *pro bono* immigration representation for detained immigrants referred to immigration court through the IRP and provides recommendations that could serve as a foundation for increasing immigration representation for both detained and non-detained immigrants across New York State.

⁷ Professional Conduct for Practitioners –Rules and Procedures, and Representation and Appearance, 73 Fed. Reg. 76914 (Dec. 18, 2008).

⁸*Id.* at 360.

Report of the Subcommittee on Quality and Standards

Standards of Representation of Clients in Immigration Cases

Preamble

In May 2011, the New York State Bar Association formed the Special Committee on Immigration Representation to address the need for quality representation in immigration cases in New York State. Under the Immigration and Nationality Act (“INA”), there is no statutory right to government-appointed counsel in immigration cases because the proceedings are civil.⁹ Instead, immigrants may be represented by attorneys, “accredited representatives,” or other “qualified representatives” at their own expense.¹⁰ For those immigrants who have been able to secure representation, however, the quality of representation has varied greatly.¹¹ As the need for representation has grown, so has the need for guidance to ensure effective representation.

In light of this need, the Special Committee on Immigration Representation was tasked with the responsibility of drafting written standards to guide the quality of representation in immigration cases in New York State. Cognizant of the complexity of immigration law and the differences in practices and resources across the state, the committee consulted numerous stakeholders and researched the legal, ethical, and practical norms that have governed diligent and competent immigration representation. The proposed standards set out below are the results of these efforts.

The purpose of these proposed standards is to provide representatives with a starting point in their efforts to provide competent, quality representation in immigration cases. These standards should be viewed as minimum standards, which alone do not establish the ideal model or the perfect case.

Representatives are encouraged to follow both the text and the spirit of these standards—and strive beyond them—to ensure quality representation in immigration cases.

The proposed standards are intended to build upon, not displace, existing rules and norms governing representation. Some of these rules and norms are referenced below. Regardless of whether they are specifically referenced, representatives must be aware of these rules and norms. All representatives must comply with existing federal rules

⁹ INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (stating that “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”)

¹⁰ *Id.*; 8 C.F.R. §§ 1292.1-1292.2 (specifying which individuals are qualified to represent noncitizens in immigration cases, including attorneys, “accredited representatives,” and “other qualified representatives”).

¹¹ The New York Immigrant Representation Study, *supra* note 1.

governing immigration representation. All attorney representatives must comply with the New York Rules of Professional Conduct, which govern the conduct of attorneys in this state.

These standards are designed to apply to all attorneys, accredited representatives, law offices and law firms engaged in providing immigration representation as authorized by federal law. No individual who is unauthorized to represent immigrants should engage in any such representation in an immigration case. Representatives who work with staff not authorized to represent immigrants in an immigration case should ensure that all staff are properly supervised and do not engage in the unauthorized practice of immigration law themselves.

Definitions

A-File or Alien File: The record compiled by the U.S. Department of Homeland Security on all matters relating to an individual's Alien Registration Number.

Immigration case: Refers generally to any proceeding involving an immigration matter before an agency within the U.S. Department of Homeland Security, U.S. Department of State, the U.S. Department of Justice's Executive Office for Immigration Review (including Immigration Court and the Board of Immigration Appeals), and any other administrative or federal petitions or appeals. Includes affirmative petitions and applications for immigration benefits, as well as defenses and applications for relief made in removal proceedings.

Removal proceedings: Immigration court proceedings and appeals before the U.S. Department of Justice's Executive Office for Immigration Review that determine whether a noncitizen is in violation of U.S. immigration laws and subject to removal from the United States.

Representative: For purposes of these standards, a "representative" refers to any individual authorized to represent an individual in an immigration case by filing an official Notice of Entry of Appearance (i.e., Form "G-28", "EOIR-28", "EOIR-27", or federal court appearance form) with the appropriate agency or court.

List of Standards

- A. Role of a Representative in an Immigration Case
- B. Training and Experience
- C. Caseload
- D. Scope of Representation
- E. Client Competency
- F. Fees
- G. File Maintenance

- H. Meeting and Communicating with the Client
- I. Investigation
- J. Affirmative Applications
- K. Review of Government Submissions and Pre-Hearing Preparation
- L. Bond Hearings
- M. Pleadings in Removal Proceedings
- N. Pre-Hearing Motions and Briefing in Removal Proceedings
- O. Requesting Continuances in Removal Proceedings
- P. Applications for Relief in Removal Proceedings
- Q. Individual Hearings in Removal Proceedings
- R. Right to Appeal

A. Role of a Representative in an Immigration Case

A-1. A representative in an immigration case shall advocate diligently for the client's interests and provide competent representation to the client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.¹²

A-2. A representative has a duty to inform the client of all available defenses and/or forms of relief in an immigration case, including the filing of applications and petitions. A representative has a duty to inform the client of the consequences of pursuing or foregoing defenses and/or forms of relief, including applications and petitions. A representative shall not substitute his or her judgment as to the choice of defenses, relief, and applications/petitions to file for that of a client, except as provided herein.¹³ Representatives should take special care in their duty to inform clients who are not currently in removal proceedings of the consequences of pursuing affirmative applications and petitions for immigration benefits where doing so may place the client at risk of removal or other adverse consequences. Representatives may file such affirmative applications or petitions only with the client's informed consent.¹⁴

A-3. If, after fully counseling and conferring with the client, a representative believes the client is not capable of exercising appropriate and reasoned judgment on his or her own behalf— due to age, mental illness or incapacity, or other mental or physical infirmity—the representative should consider and, if appropriate, consult with the client

¹² See N.Y. Rules of Professional Conduct Rule 1.1(a) (regarding competence).

¹³ Exceptions include where the client seeks the representative's assistance to file an application that the representative knows is frivolous or fraudulent, or where the client seeks the representative's assistance to engage in conduct that the representative believes to be unlawful. See N.Y. Rules of Professional Conduct Rule 1.2 (d), (f). Moreover, a representative "may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client." *Id.* Rule 1.2(e).

¹⁴ Under the N.Y. Rules of Professional Conduct Rule 1.0(j), "informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." For purposes of "informed consent" as used in these standards, we adopt this definition for all representatives in immigration cases.

regarding moving the court for a guardian ad litem or other appropriate recourse to ensure the client's best interests.¹⁵

A-4. Under no circumstances may a representative counsel a client to engage, or assist a client, in conduct that the representative knows is illegal or fraudulent, except that the representative must discuss the legal consequences of any proposed course of conduct with a client and also explore and advise on better options that may not be readily obvious.¹⁶

Commentary:

The role of a representative in an immigration case should be understood within the confines of a representative's general ethical duties. Representatives should be familiar with the local rules of any court, agency, or tribunal before which they appear, including ethical rules and decisions. Attorney representatives must abide by all applicable rules governing attorneys' professional responsibilities and rules of professional conduct and other applicable codes/rules. Accredited representatives must also abide by all applicable rules governing the Board of Immigration Appeals' Recognition and Accreditation Program.¹⁷

B. Training and Experience

B-1. Immigration law is a highly complex field. Representatives must be adequately versed in the procedural and substantive law relevant to a client's specific immigration needs or associate with an experienced practitioner who is competent to handle the matter.¹⁸ Representatives of clients in removal proceedings should familiarize themselves with the requirements of immigration court practice as well as the substantive legal areas involved in the case.

B-2. Because the field of immigration law is complex and constantly changing, all representatives who are involved in providing immigration representation should be required to complete a minimum of four hours annually of continuing legal education (CLE) and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical responsibilities relevant to the area of immigration law in which they will be practicing are sufficient to enable them to provide quality representation. Attorneys who provide representation in areas that include, but are not limited to immigration law, should allocate a significant portion of their annual mandatory continuing legal education credits towards courses directly related to the area

¹⁵ For further guidance, representatives should refer to the standard on client competency below. *See also* New York Rules of Professional Conduct Rule 1.14 (regarding clients with diminished capacity).

¹⁶ *See* N.Y. Rules of Professional Conduct Rule 1.2(d) (regarding scope of representation and allocation of authority between client and lawyer). Nothing in this standard should be read to prevent a representative from counseling or representing a noncitizen who is unlawfully present in the U.S.

¹⁷ *See* 8 C.F.R. § 292.1.

¹⁸ *See* N.Y. Rules of Professional Conduct Rule 1.1(b) ("A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.").

of immigration law and should continue to have access to updates and training as required.

B-3. Areas involving complex issues, such as criminal grounds of removal, require special expertise and representatives should have considerable experience in the area or seek mentorship from an experienced immigration law practitioner. Representatives should consider attending additional CLE courses and other training programs for such complex issues if they arise in their clients' cases.

B-4. All representatives shall supervise staff closely, conduct appropriate training, and protect against the unauthorized practice of immigration law.

Commentary:

This standard reflects the minimum amount of CLE training related to immigration law and practice that a representative should seek annually. By no means should a representative assume that fulfilling this minimum requirement will ensure that he or she is fully versed in the many issues that may arise in immigration cases. Representatives should seek regular and ongoing training in immigration representation and developments in law and practice.

Moreover, the Special Committee on Immigration Representation recognizes that CLE and training programs should be made available and affordable for all representatives providing immigration representation and that public funding should be provided to enable all nonprofit representatives to attend such programs to ensure that they will provide quality representation to indigent clients.

C. Caseload

C-1. A representative shall not carry a caseload that, by reason of its excessive size or representation requirements, interferes with the provision of quality legal representation and the satisfaction of ethical obligations to his or her clients.

C-2. A representative shall maintain a caseload that allows for competent, quality representation. Therefore, before agreeing to act as a representative, the representative has an obligation to ensure that he or she has sufficient time, knowledge, available resources and experience to offer quality legal services. In practice, this means that:

- (1) A representative shall act with reasonable diligence and promptness in representing a client.¹⁹
- (2) A representative shall not neglect a legal immigration matter entrusted to the representative.²⁰

¹⁹ See N.Y. Rules of Professional Conduct Rule 1.2 (regarding diligence).

²⁰ *Id.*

C-3. A representative shall not intentionally fail to carry out the written agreement entered into with a client for professional services as required by these standards (i.e., section D-1(1) below), but the representative may withdraw with proper notice to the client and as permitted under the rules and regulations, including the requirements of the Immigration Court Practice Manual.²¹

D. Scope of Representation

D-1. A representative has the duty to ensure the client understands the scope of representation and that the client's rights are duly protected. This includes the following aspects of representation:

- (1) Initiation of representation: At the initiation of representation, a representative has a duty to confirm the scope of the representation with the client through a written agreement.²² In particular, the representative should provide clear notice of what aspects of the immigration case the representative will be handling and whether the representation agreement will include any appeals.
- (2) Conflicts of interest: Where a representative is approached by multiple individuals seeking representation in an immigration case (such as spouses or other family members, or an employer/employee), a representative has a duty to investigate any conflicts of interest. If a potential or actual conflict of interest exists, a representative shall not represent the multiple clients unless the representative reasonably believes that he or she will be able to provide competent and diligent representation to each affected client and the representative obtains informed consent confirmed in writing from each of the individuals accordingly.²³ A representative's obligation to investigate conflicts extends beyond new conflicts to ensure that the representative does not take on the representation of a new client whose interests are materially adverse to a former client.²⁴
- (3) Withdrawing or Terminating Representation: Where a representative must withdraw from representation before completion of the tasks outlined in the written agreement on scope of representation, the representative must provide reasonable notice to the client and advise the client on how to obtain another legal representative. The representative must also notify the agency or court in a manner that complies with applicable rules and practices (including, for court matters, with the Immigration Court Practice Manual). The

²¹ See Immigration Court Practice Manual, "Appearances Before the Immigration Court" ch.2.3(i)(ii), available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%202.pdf>.

²² In New York, current law does not require that representatives execute a written agreement with respect to the scope of representation in all cases. See N.Y. Rules of Professional Conduct, Rule 1.5 (specifying communication requirements for the scope of representation); see also 12 N.Y.C.R.R. §§ 1215.1 & 1215.2 (requiring a written letter of engagement where fees are expected to equal or exceed \$3,000). New York has required written agreements for certain types of matters, such as in cases involving fees for domestic relations matters. See N.Y. Rules of Professional Conduct Rule 1.5(d)(5). As explained in the commentary, the drafters of these standards have concluded that written agreements should be required in all immigration cases, to protect the interests of both client and representative.

²³ See N.Y. Rules of Professional Conduct Rule 1.7 (regarding conflict of interest).

²⁴ See N.Y. Rules of Professional Conduct Rule 1.9 (regarding duty to former clients).

representative must return any advanced fees, costs, or payments provided to him or her by the client for the tasks not completed.

Where a representative terminates representation after completion of the tasks outlined in the written agreement on scope of representation, the representative has a duty to inform the client of the outcome of his or her efforts and clearly specify that the representative is no longer representing the client. The representative must follow all other standards herein triggered by the closing of a case.

If the representative receives any other correspondence, notices, order, decisions, or any other materials from an agency or court regarding a client whose representation has been terminated, the representative must make every reasonable effort to forward the materials to the client and must inform the agency or court that he or she is no longer representing the client.

Commentary:

Issues of scope of representation are particularly important in the immigration context because some immigration cases involve multiple agencies and courts. For example, a detained noncitizen facing removal proceedings may be eligible for affirmative immigration benefits adjudicated by various agencies. Full representation might require representation in immigration court on removal proceedings and on bond, before the Department of Homeland Security's Immigration and Customs Enforcement to negotiate bond, and before the Department of Homeland Security's Citizenship and Immigration Services to file certain affirmative applications for relief. Before the initiation of representation, a legal representative has a duty to investigate and explain to the client the various forms of advocacy that will be necessary or beneficial to his or her immigration case. The representative must then discuss and clarify with the client which forms of advocacy the representative will pursue as part of their written agreement.

The requirement of a written agreement on scope of representation stems in part from Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). In that case, the Board of Immigration Appeals determined that a claim of ineffective assistance of counsel is required to be supported by an affidavit from the client detailing the agreement between counsel and client concerning representation, that counsel must be informed of the allegations against him or her and given an opportunity to respond, and that the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. Requiring all representatives to execute a written agreement for services in an immigration case ensures that the rights of both representative and client are protected.

E. Client Competency

E-1. If there are indicia that a client lacks competency to understand the nature and object of the immigration case and cannot participate in his or her defense, a representative has a duty to discuss such issues with the client and should present this evidence to the judge/adjudicator in the immigration case so that appropriate steps may

be taken to safeguard the client's rights. In documenting evidence of the client's lack of competency, a representative should interview the client and his or her family members or friends, gather any medical or psychological records, request production of relevant documents from the U.S. Department of Homeland Security (if necessary, by subpoena), and seek a competency determination.

Commentary:

Issues concerning a client's competency may raise issues concerning continuing representation. A representative should be wary of proceeding on a client's behalf when there are serious competency issues in the absence of a guardian.²⁵

An Immigration Judge's duties to address issues of competency are addressed in Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011). Representatives should be familiar with this and other cases discussing competency.

Where necessary, representatives should consult with disability advocacy agencies in their jurisdiction for assistance.

F. Fees

F-1. A representative shall not make an agreement for, charge, or collect an excessive or illegal fee or expense.²⁶

F-2. A representative shall communicate in writing to a client at the beginning of the representation or within a reasonable time thereafter the fee for such representation and any expenses associated with the representation for which the client is responsible.²⁷ A representative shall promptly communicate and obtain written informed consent from the client to any changes in the fees or expenses associated with the representation. A representative shall not charge or collect a nonrefundable retainer fee. A representative shall not charge or collect a contingency fee.²⁸

F-3. Where the representation concludes without completion of the services agreed upon in the written scope of representation agreement, a representative shall render an account of time spent on a client's case and refund any unearned fees. A representative shall under such circumstances issue the refund with a letter memorializing the reason for termination of services.

F-4. A representative should resolve fee and expense disputes promptly and in advance of court appearances.

²⁵ See N.Y. Rules of Professional Conduct Rule 1.14 (regarding clients with diminished capacity).

²⁶ See N.Y. Rules of Professional Conduct Rule 1.5(a) (regarding excessive fees).

²⁷ Although not always required under New York law, see 12 N.Y.C.R.R. §§ 1215.1 & 1215, a written fee agreement is of particular importance in immigration matters due to the requirements under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). For further discussion of these requirements, please refer to the commentary for the preceding standard on scope of representation.

²⁸ The New York Rules of Professional Conduct recognize circumstances where nonrefundable retainer fees and contingency fees may be appropriate. See *id.* Rule 1.5(d). As explained in the commentary, however, the drafters of these standards have concluded that immigration cases are ill-suited for nonrefundable retainer fees and contingency fees.

Commentary:

Over the years, many clients in immigration cases have expressed concerns about the excessiveness and uncertainty regarding the fees charged by and owed to their representatives. Because of these concerns, and the particular vulnerability of many noncitizens who seek representation, it is advisable to require a written fee agreement.²⁹ A written fee agreement can be a valuable tool to avoid misunderstanding and may also clarify other concerns that commonly arise in immigration cases. For example, it is not uncommon for legal fees to be paid by a client's relatives or friends, rather than the client. However, the client must be fully informed of the fees for representation and any disputes regarding payment. A representative's duties are to the client and not to the individual providing payment for the legal services.³⁰

G. File Maintenance

G-1. A representative has the duty to maintain his or her client's file. This includes keeping in a secure and confidential place: (a) all paper and electronic correspondence to and from the relevant government agencies; (b) all paper and electronic evidentiary records—documents, certificates, letters of support, declarations or affidavits, and any other records—from the client, his or her friends and family, the A-File, government agencies, criminal/family/other courts, medical professionals, and any other individuals, agencies, and institutions; (c) all correspondence, motions, briefs, evidence, and other attachments filed with the relevant court/agency or sent to/from opposing counsel; and (d) all notices, correspondence, and decisions received from the relevant court/agency.

G-2. In many immigration cases, the court or agency will require the client, supporting petitioners or witnesses, and others involved in a case to provide certain types of original or certified documents. A representative has a duty to determine when original or certified documents, rather than copies/facsimiles, are required. When handling original documents, a legal representative shall take special care to secure those documents and keep them for only as long as necessary for representation. The legal representative shall return all originals as soon as is practicable after such documents are no longer needed for the case.

G-3. A representative also has a duty to keep an adequate record of developments in the immigration case. This includes keeping notes of telephone conversations, meetings, and hearings with opposing counsel, the court, or agency officials. A representative shall include these notes as part of the file.

G-4. At all times the client has a right to the file in his or her case, except for any documents that belong solely to the representative, such as internal memoranda that are

²⁹A client is "entitled to be charged a reasonable fee and to have [his/her] lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. [A client] is entitled to request and receive a written itemized bill from [her/her] attorney at reasonable intervals." *See Statement of Client's Rights*, #44, 22 N.Y.C.R.R. § 1210.1

³⁰*See* N.Y. Rules of Professional Conduct Rule 5.4 (regarding professional independence of a lawyer).

intended for the benefit of the representative rather than the client, or documents the disclosure of which would violate a duty of nondisclosure owed to a third party.³¹

G-5. A representative must maintain the file for the pendency of the case. Unless the client provides informed consent, a representative should not destroy or discard any information or documents that the lawyer knows or should know may be necessary or useful in the assertion of a client's defense or right to relief in an immigration case.

G-6. Upon termination of representation, a representative should make a good faith effort to provide the client with a complete copy of any documents in the file that the representative has not previously provided, including all notices, forms, applications, motions, briefs, exhibits, decisions, and other materials prepared or received for the client's case. A representative should also retain a copy of the file in his or her records for a reasonable period of time. In determining the length of time that is reasonable for file retention, a representative should exercise discretion based on the nature and contents of the file and the client's objectives following the disposition of the immigration case. For example, if a client intends to pursue an immigration benefit in the near future, the files should be maintained for a sufficient period with the relevancy and materiality of the records in mind.

G-7. A representative must maintain any documents or records relating to the retainer, any costs or fees, and any invoices and receipts for payments for at least seven years after the events that these documents record.³² A representative should make a good faith effort to keep these records beyond this seven-year period for as long as is reasonably possible given the representative's hard file and electronic storage capacities.

G-8. If a former client retains a new representative to handle the immigration case or future matters, the previous representative has a duty to provide that new representative with a copy of the client's file upon consent by the former client.³³

G-9. Where a representative destroys or discards any documents or other records in a file (or the file as a whole), the representative should maintain an index of the documents or records destroyed or discarded. The representative should provide that index to his or her client or former client upon request.

Commentary:

³¹See *Sage Realty Corp v Proskauer, Rose, Goetz & Mendelsohn*, 689 N.E.2d 879 (N.Y. 1997) (leading case on client's right to his or her file in New York).

³²See N.Y. Rules of Professional Conduct Rule 1.15(d)(1) (requiring that a lawyer maintain bookkeeping records for seven years).

³³Under New York law, when a client owes an attorney payment of fees, the duty of an attorney to provide a new representative or the client with a file is, generally speaking, subject to any valid retaining lien absent a showing of exigent circumstances or undue hardship, such as prejudice to the client's case and an inability to pay. See, e.g., *Pomerantz v. Schandler*, 704 F.2d 681, 683 (2d 1983); *Hoke v. Ortiz*, 632 N.E.2d 861, 865 (N.Y. 1994); *Cohen v. Cohen*, 183 A.D.2d 802, 803 (N.Y. Sup. Ct., App. Div., 2d Dep't 1992). In many immigration cases, where the client's case is still pending before an agency or federal court, the retention of file documents is likely to be prejudicial and otherwise cause hardship to the client. For these reasons, retaining liens generally should not be used to settle payment disputes in immigration cases, particularly in cases where the client is indigent.

The general rules for the retention of legal documents under New York law are the starting point for this standard. Stricter standards have been set here, where specified, given the importance of such records for clients whose immigration cases are still pending and/or for clients and representatives who must address fee disputes or ineffective assistance of counsel claims. Given the significant stakes in immigration cases—including loss of status, detention, or deportation—representatives should strive to meet and exceed any and all applicable standards for document retention, record keeping, and file sharing. Electronic storage, through conversion and scanning of hard file documents into electronic formats, is one means by which representatives may be able to expand the size and duration of their file retention capacity.

H. Meeting and Communicating with the Client

H-1. To ensure effective communication with and participation by the client, a representative shall take all appropriate and reasonable measures to:

- (1) Meet with the client as necessary to prepare for his or her case;
- (2) Meet with the client in a location where the representative and the client can discuss the case in confidence;
- (3) Secure the assistance of a competent interpreter when the client and the representative cannot effectively communicate in the same language;
- (4) Explore the client's objectives and goals in the representation;
- (5) Keep the client informed about the status of his case on a reasonable basis, including informing the client of all court dates and explaining the nature of each court appearance and the client's role;
- (6) Provide the client with copies of all documents obtained on the client's behalf and all documents submitted to the government counsel, agencies, and courts regarding the client's case on a reasonable basis;
- (7) Promptly inform the client of any decisions that the client needs to make involving material developments in the case;
- (8) Explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation;
- (9) Consult with the client about the means by which the client's objectives are to be accomplished;
- (10) Promptly comply with reasonable requests for information;
- (11) Meet with the client and witnesses well in advance of agency appointments and court hearings to prepare for oral testimony;
- (12) Meet with the client after any agency or court renders a decision in the client's case to discuss the appeal process and other options.

H-2. If the client is incarcerated or otherwise detained, a representative shall:

- (1) Endeavor to meet with the client as often as reasonably possible in light of the distance between the detention facility and the representative's office;
- (2) Establish effective ways to communicate by telephone or in writing on a regular basis.

Commentary:

A representative should endeavor to make the client a full participant in the litigation of the client's case. This often requires special care where the client and representative cannot speak the same language. In such cases, the representative must secure the assistance of a competent translator who is sufficiently proficient in each language and in the legal terms and expressions necessary to ensure effective representation.

In some cases, a client may prefer to use a family member or other potentially interested party to translate. A representative has a duty to ensure that there is no conflict of interest presented by such an arrangement and should proceed only after obtaining informed consent from the client of waiving his/her rights of confidentiality as to the translated information. Even where no conflict of interest is apparent, a representative must also assure that the party is competent in providing translations and that such translations do not impede the client-representative relationship due to sensitivity of issues or other concerns. All written translations must comply with immigration regulations and the Immigration Court Practice Manual to ensure proper certification for submission in court, if required.

I. Investigation

I-1. A representative has a duty to investigate each case thoroughly and to identify and obtain any documents reasonably necessary to provide diligent and competent representation of the client. A representative's investigation should include the following steps:

- (1) Interview the client;
- (2) Interview potential witnesses who may provide affidavits, declarations or testimony relevant to the client's case;
- (3) Review documentation and records provided by the client, including educational, tax, employment, medical, psychological, psychiatric, criminal and other court records relevant to the case;
- (4) Request and review relevant records not in the client's possession but relevant to the immigration case, including educational, tax, employment, medical, psychological, psychiatric, criminal and other court records. To obtain these records, a legal representative may need to secure the client's written authorization or a court issued subpoena;
- (5) Obtain and review a copy of the client's A File from the government either by requesting the same from the Office of the Chief Counsel or in the alternative through a Freedom of Information Act request;
- (6) Review any records of prior proceedings by making a request with the Immigration Court in compliance with the Immigration Court's procedure and rules or in the alternative through a Freedom of Information Act request;
- (7) Evaluate, in consultation with the client, the need for outside expert testimony or evaluations and discuss benefits and need for such expertise.

I-2. A representative also has a duty to research thoroughly the law applicable to the client's case, including all applicable legal precedent, statutory and regulatory provisions.

Commentary:

Immigration law is an area of practice in constant change. A representative must keep up to date on changes in the law, including precedent decisions of the Board of Immigration Appeals and the Courts of Appeals, statutory and regulatory changes, policy shifts on the part of the applicable agencies, international law. A representative should seek out consultation or mentoring by a more experienced practitioner where a matter involves novel or complex issues.

J. Affirmative Applications

J-1. A representative has a duty to inform the client of any affirmative applications for immigration benefits for which the client may be eligible. A representative shall be familiar with the statutory and regulatory eligibility requirements, deadlines, filing procedures, any applicable filing fees or waivers thereof, and supporting evidentiary requirements associated with such applications. A representative shall educate his or her client on the eligibility requirements, deadlines, filing procedures, filing fees or waivers thereof, and supporting evidentiary requirements that are associated with seeking the available applications.

J-2. A representative must inform the client of the consequences of filing such affirmative applications, including the risk that the Department of Homeland Security may initiate removal proceedings if applicable. A representative shall not file an affirmative application for an immigration benefit without the informed consent of the client.

J-3. In preparing to submit an affirmative application for an immigration benefit, a representative shall prepare and carefully review with the client the proposed submission and supporting documents in a manner and language that ensures the client's comprehension of the submission and documents and the benefit sought.

J-4. No representative shall file an application or provide material information therein that he/she knows to be false. Representatives shall inform clients of the representative's obligations to correct false information to the tribunal.³⁴ Representatives shall advise clients of the consequences that may arise from filing a false or frivolous application with a federal agency.

Commentary:

³⁴ See N.Y. Rules of Professional Conduct Rule 3.3 (proscribing the offer or use of material evidence that the lawyer knows to be false, and specifying the lawyer's obligation to "take reasonable remedial measures including, if necessary, disclosure to the tribunal"). See also NY Ethics Opinion 837 (2010) (finding that if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure).

Affirmative applications generally involve seeking a benefit on behalf of a client and can be as simple as seeking a replacement document or as complex as a request for asylum or complicated employment based visa. An inaccurate or baseless application may have significant and continuing adverse consequences to a client. The filing of any application for a client who is not in removal proceedings may trigger removal proceedings and/or detention if the government believes that the client is removable and decides to pursue removal charges. Preparation and filing of these applications, even when not filed with the court, should be accorded the same care and consideration as court filings.

K. Review of Government Submissions and Pre-Hearing Preparation

K-1. In advance of all court hearings and agency appointments/interviews, a representative shall promptly review all documents and evidence submitted and filed by the Department of Homeland Security for proper service, factual accuracy, and legal sufficiency. A representative must also research and assess the burden of proof and the evidence needed by the parties to meet that burden. If the client is subject to removal, a legal representative shall investigate and identify forms of relief for which the client may be eligible.

Commentary:

A representative should discuss the representative's best judgment about the strength of the government's case with his/her client in a way that enables the client to be a full participant in the strategic decision to be made in immigration court or before the agency.

L. Bond Hearings

L-1. A representative shall ascertain and discuss with every detained client his/her custody status and eligibility for bond. A representative shall be fully familiar with the Immigration Court's jurisdiction to conduct a bond hearing and with the requirements for seeking a bond redetermination hearing, including the contents of a request, evidence to be submitted in support of a bond request and the scope of a hearing.

L-2. For clients who are eligible for bond, a representative shall ascertain the client's financial ability to pay a bond and shall explain to the client all possible outcomes of a bond redetermination hearing, including the court setting an unaffordable bond, the appeal process and the possibility of a stay pending appeal.

L-3. Where appropriate, and in consultation with the client, a representative should attempt to negotiate a reasonable bond or alternatives to bond (intensive supervision appearance program- ISAP) with the government.

Commentary:

Immigration courts treat bond matters and removal charges as separate proceedings. However, generally, once a representative enters an appearance in Immigration Court, that appearance is for all proceedings before the court, including bond. Therefore, a representative in removal proceedings for a detained client should be familiar with bond matters so that he or she may advise the client appropriately.

In some circumstances, however, a representative may seek permission to enter a limited appearance for the bond proceedings only. This may be particularly appropriate where there is a risk of transfer and the representative would be unable to fulfill representation in the removal proceedings if the detained client will be transferred to a facility in another jurisdiction. The immigration court makes the final determination as to whether it will permit such limited representation, and different courts have different approaches to the issue.

Representatives should also be aware of the relevant immigration and federal court case law governing an individual's eligibility for bond. Representatives should familiarize themselves with legal arguments regarding eligibility for bond and the appropriate forums for raising such arguments (including petitions for writs of habeas corpus in federal court). Representatives who practice in federal court should consider seeking the mentorship of experienced federal court practitioners when filing petitions. Where representatives are unable to bring federal court challenges to bond ineligibility, representatives should, at a minimum, inform clients of the option of challenging their detention in federal court.

M. Pleadings in Removal Proceedings

M-1. Before answering to exclusion, deportation or removal allegations and charges (i.e., often referred to as “entering pleadings”) during a master calendar hearing, a representative has the duty to discuss the removal charges and allegations with the client, including the technicalities of the hearing as well as the legal implications of admissions and denials of factual allegations and grounds for removal and relief requests.

M-2. At the master calendar hearing a legal representative must be reasonably prepared to:

- (1) Concede or deny service of the Notice to Appear;
- (2) Review, ask for more time to review, or raise objections to the evidence offered by the government in support of the Notice to Appear;
- (3) Admit or deny factual allegations and charges contained in the Notice to Appear where appropriate;
- (4) Designate or decline to designate a country for removal;
- (5) State which applications for relief, if any, a client intends to file;
- (6) Identify and narrow factual and legal issues;
- (7) Estimate the amount of time (hours) needed to present the case;
- (8) Request a date for filing applications for relief; and
- (9) Request an interpreter if the client or potential witnesses need one.

Commentary:

A representative has the duty to discuss all strategic decisions with the client in advance of taking the pleadings. A representative must provide the client with information that will allow the client to participate intelligently in all decisions to be made during the course of the representation. The choice regarding how to proceed belongs to the client.³⁵

A representative shall not request relief from removal that cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. Nor shall a legal representative advise a client not to seek a form of relief from removal solely because the chance of success on the merits is slim where the request is not frivolous. Such strategic disagreements about whether a proposed course of action violates one or the other of these dictates may, if they cannot be resolved, form the basis for ending the legal representation .

N. Pre-Hearing Motions and Briefing in Removal Proceedings

N-1. A representative should consider filing an appropriate motion where the applicable law entitles the client to do so and the court has the power to grant such motion. Among the issues that a representative should consider addressing in a pre-hearing motion are:

- (1) Possible defects in the issuance of the charging document;
- (2) Legal sufficiency of the charging document;
- (3) Suppression of evidence.

N-2. A representative shall be fully familiar with and in compliance with the practices and local rules of the court or agency adjudicating the motion/briefing, including the Immigration Court Practice Manual and its provisions regarding motions and briefing requirements, or affiliate with a representative knowledgeable in these practices and rules.

N-3. Motions and all submissions in support of the motions should be filed in a timely manner and should comport with the requirements set forth in the Immigration Court's Practice Manual and/or the local rules of the Immigration Court or applicable tribunal. When the tribunal requires an evidentiary hearing on a motion, a representative should fully prepare for the hearing, such preparation should include understanding the burden of proof, conducting investigation and research on the claim advanced, and preparing all helpful witnesses.

N-4. A representative shall discuss the advantages and disadvantages of pre-hearing motions with the client, taking into account the possible benefits and the client's

³⁵See N.Y. Rules of Professional Conduct Rule 1.4 (regarding duty to communicate).

ultimate goal in the proceedings.³⁶ A representative may also consult with opposing counsel before making a formal motion.

O. Requesting Continuances in Removal Proceedings

O-1. Unreasonable delays due to a representative's inability to promptly act on a client's behalf should be avoided. No representative shall accept an immigration matter that is before the Executive Office for Immigration Review unless that representative unless that representative is confident that he/she can provide competent and diligent representation.³⁷

O-2. A representative shall work diligently to complete all necessary investigations to be fully prepared for each court proceeding. A representative shall attend each scheduled immigration court proceeding. In the event that a representative is unable to attend a hearing, he/she shall promptly notify the client of his/her unavailability and make a timely request (i.e., motion) to the immigration court for a continuance to a date and time that accommodates both the representative and the client. If the immigration court denies a request for continuance, the representative shall make all necessary accommodations that will ensure that his/her client is effectively represented at each immigration hearing.

O-3. Effective representation during removal proceedings, at a minimum, also requires that the representative obtain all available and relevant information concerning the client's background and circumstances for purposes of determining removability and/or any available relief from removal. Investigating the facts concerning the client's immigration matter and any relevant available remedies while also thoroughly researching the law and applicable supporting factual information is crucial to providing high quality representation. If a representative finds it necessary to seek additional time and/or resources to ensure adequate investigation, research and preparation of a removal proceeding, the representative should first consult with the client and discuss the process involved, the benefits and any potential consequences that may result from requesting a continuance in the removal proceedings. Representatives should also obtain informed consent from the client before seeking a continuance from the Executive Office for Immigration Review. In addition, representatives of detained clients must be particularly diligent in assessing the need for a continuance with his/her client while balancing the representative's needs with the client's liberty interest.

O-4. A representative shall be fully familiar with and shall follow all necessary requirements for filing a motion for continuance of removal proceedings. The motion should be filed only after the representative has obtained informed consent from the client. A representative shall provide his/her client with a copy of the motion for

³⁶In New York current law does not require a lawyer to consult with clients on all strategic decisions, although lawyers are obligated to pursue clients' goals. *See* N.Y. Rules of Professional Conduct Rule 1.2 and 1.4 (regarding scope of representation and allocation of authority between client and lawyer and a lawyer's duty to communicate respectively). For example, N.Y. Rules of Professional Conduct Rule 1.4(2) imposes a duty on the lawyer to "reasonably consult with the client about the means by which the client's objectives can be accomplished."

³⁷*See* N.Y. Rules of Professional Conduct Rule 1.1(b) (regarding competence).

continuance and inform the client of any decision issued by the immigration court in response to the filed motion. Before the filing of a motion for continuance, the client should be notified that the mere filing of the motion does not excuse the appearance of the client and/or representative at any scheduled hearing. All parties must appear as scheduled unless and until a motion for a continuance is granted.

Commentary:

When seeking continuances, representatives shall consult with local court rules and practices, including the Immigration Court Practice Manual.

P. Applications for Relief in Removal Proceedings

P-1. A representative shall thoroughly investigate a client's eligibility for all possible forms of relief from removal. Representatives shall be fully familiar with the legal requirements and evidence necessary to support any and all applications for relief from removal. The representative shall prepare and carefully review with the client all available applications and their statutory and regulatory criteria for relief from removal in a manner and language that ensures the client's comprehension of the potential defense strategies and available applications for relief from removal being discussed.

P-2. A representative shall be familiar with the filing procedures, the applicable filing fees or waivers thereof, and supporting evidentiary requirements associated with all of the forms of relief from removal available to and sought on behalf of his/her client. A representative shall educate his/her client on the application filing procedures, supporting evidentiary requirements and filing fees or waivers thereof, that are associated with seeking the available applications for relief from removal.

P-3. In consultation with a client, the representative and client shall agree upon which applications for relief from removal, if any, will be sought on behalf of the client with the immigration court and/or Department of Homeland Security.

P-4. A representative shall properly notify a client of all necessary filing requirements and any deadlines that will preserve any and all applications for relief from removal. A representative shall also advise his/her client of the consequences involved in failing to timely file any and all necessary applications, supporting evidence, motions and filing fees or waivers of filing fees with the immigration court and/or relevant agency.

P-5. In consultation with the client, representatives shall seek evidence in support of any and all applications for relief from removal that are being sought on the client's behalf before the immigration court and/or the Department of Homeland Security including, but not limited to, applying for a subpoena for production of documents or witnesses, when necessary.

P-6. All applications, supporting evidence, any motions and/or any necessary filing fees or waivers of filing fees shall be submitted to the immigration court or the

Department of Homeland Security in a timely manner. A representative shall notify a client immediately of any inability to timely file an available application for relief from removal and shall advise the client of the likely consequence that may arise from failure to timely file an available application for relief from removal.

P-7. Representatives shall provide all clients with copies of any and all submissions made to the immigration court and/or the Department of Homeland Security on a client's behalf.

P-8. Representatives shall advise all clients of the benefits awarded for all applications of relief from removal that are granted. Representatives shall also advise all clients of the immigration consequences that may arise if any application for relief from removal sought is denied.

P-9. No representative shall file an application or provide information therein that he/she knows to be false. Representatives shall advise all clients of the consequences that may arise from filing a frivolous or fraudulent application with the immigration court and/or Department of Homeland Security. Representatives shall inform clients of the representative's obligations to correct false information to the tribunal.³⁸

P-10. A representative shall provide the client with any information necessary to ensure that the client is informed of any and all benefits that are available following the grant of relief from removal.

P-11. A representative shall timely inform of the client of his/her right to appeal any denial of a request for relief from removal, where applicable.

Commentary:

Where an application for relief from removal is filed, a representative must file the most updated version of the application for relief from removal, and shall consult with the Executive Office for Immigration Review and/or the U.S. Department of Homeland Security to ensure that the appropriate forms, supporting evidence, and filing fees/fee waivers are submitted in a timely manner. The most updated versions and filing fees are published at the EOIR website at <http://www.justice.gov/eoir/formspage.htm> and USCIS at the "Forms" section of <http://www.uscis.gov>.

Q. Individual Hearings in Removal Proceedings

Q-1. In preparation for an individual hearing on any applications for relief from removal, a representative shall be fully familiar with trial procedures set forth in the Immigration Court Practice Manual, including but not limited to making opening and closing statements, raising objections to opposing counsel's evidence, presenting witnesses and evidence on all issues, cross examining opposing witnesses and objecting to unlawful or inadmissible testimony. Representatives shall also be fully familiar with

³⁸See N.Y. Rules of Professional Conduct Rule 3.3, *supra*; see also NY Ethics Opinion 837 (2010), *supra*.

Immigration Court Practice rules and local rules regarding the submission of applications for relief, proposed exhibits and motions. Representatives who lack experience in these matters should affiliate with experienced representatives.

Q-2. A representative shall explain to the client the nature of the proceedings, including the format of the individual hearing. In consultation with the client, the representative should develop a theory of the case, timely submit documentary evidence in support of the application(s) for relief, consider the need for and secure lay and expert witnesses, and fully prepare the client and all witnesses for testimony at the hearing. Preparation for testimony should include a discussion of the direct examination questions that the representative plans to ask the client and witnesses, anticipation and discussion of the possible questions that the opposing counsel may ask during cross examination, and anticipation and discussion of the possible questions that the Immigration Judge may ask. The representative should endeavor to moot the hearing with the client and witnesses through mock direct and cross examination before the hearing.

Q-3. Throughout the individual hearing, a representative should endeavor to establish a proper record for appellate review. As part of this effort, representatives should request, whenever necessary, that every part of the proceedings be recorded by the tribunal.

Q-4. A representative must be fully familiar with the ethical rules regarding the consequences of presenting false documents or making a false statement to the tribunal and discuss them with the client and all witnesses. Representatives shall inform clients of the representative's obligations to correct false information to the tribunal.³⁹

Q-5. When working with limited English proficiency clients, a representative shall ascertain the client's best language and use a competent interpreter in preparing the client to testify. In addition, when the court provides an interpreter, the representative shall ensure that the client fully understands the interpreter provided by the court.

Q-6. Upon obtaining client consent, representatives are encouraged to discuss the relative merits of the client's case with opposing counsel in advance of the individual hearing for the purpose of discussing sensitive matters, narrowing issues, or stipulating to issues such as statutory eligibility for the relief sought.

Commentary:

The Immigration Court Practice Manual governs most of the practices relating to individual hearings. However, some Immigration Judges may take varying approaches to how they conduct individual hearings and what types of evidence they may deem appropriate. Before representing a client in an individual hearing before an Immigration Judge with whom the representative is unfamiliar, the representative should endeavor to observe an individual hearing before the Immigration Judge or speak with representatives who have appeared before the Immigration Judge.

³⁹See N.Y. Rules of Professional Conduct Rule 3.3, *supra*; see also NY Ethics Opinion 837 (2010), *supra*.

R. Right to Appeal

R-1. At the time of the issuance of any appealable order, a representative must, in a timely manner, provide the client with a copy of the decision and any accompanying instructions for appeal. Even when a representative is not representing a client on appeal, the representative has a duty to inform the client of his or her right to appeal. This means that the representative must provide the client with a written or oral explanation of his or her right to appeal, including any deadlines and other pertinent rules. Special care should be taken if the client no longer has access to representation. In such cases, the representative should explain the client's right to file the appeal *pro se*.

Report of the Working Group Reviewing the Board of Immigration Appeals' Recognition and Accreditation Process

The Immigration and Nationality Act (INA) provides that persons in removal proceedings before an immigration judge, or in any appeal proceedings before the Board of Immigration Appeals (BIA), shall have the “privilege” of being represented by counsel of their choosing.⁴⁰ However, such representation must be “at no expense to the Government,”⁴¹ and need not be provided by a licensed attorney. Instead, a person may be represented—whether in removal proceedings in Immigration Court, or in applications to the Department of Homeland Security (DHS) for immigration benefits such as permanent residence—by either an attorney⁴² or by any one of a list of non-attorneys set out by regulation, including law students or law graduates under the supervision of a licensed attorney,⁴³ certain “reputable individual[s]” of “good moral character” appearing at the request of the person entitled to representation,⁴⁴ or an accredited official of the government to which the foreign national owes allegiance.⁴⁵

By far the largest class of non-attorneys who can represent people in immigration matters, however, consists of what are known as “accredited representatives,” who are persons—who must be individually accredited by the BIA⁴⁶—who appear on behalf of qualified organizations which themselves have been recognized as (1) possessing adequate knowledge and experience to provide immigration services; (2) having access to appropriate legal resources (such as law libraries and electronic information sources); (3) having access to supervision by and/or consultation with attorneys or other recognized organizations; and (4) charging only nominal fees for those services, and not charging excessive membership fees.⁴⁷

Beyond these minimal requirements, however, the regulations provide little guidance, few incentives for compliance, and virtually no oversight. While there are a number of recognized organizations whose accredited representatives provide high quality representation to their clients, there are also known instances where BIA-accredited representatives provide inadequate services that may do their clients more harm than good.⁴⁸ The crisis in immigration representation, which is longstanding and which is a major reason for the very existence of the federal program permitting representation of

⁴⁰ INA § 292, 8 U.S.C. § 1362.

⁴¹ *Id.*

⁴² 8 C.F.R. §§ 292.1(a)(1), 1292.1(a)(1).

⁴³ 8 C.F.R. §§ 292.1(a)(2), 1292.1(a)(2).

⁴⁴ 8 C.F.R. §§ 292.1(a)(3), 1292.1(a)(3).

⁴⁵ 8 C.F.R. §§ 292.1(a)(5), 1292.1(a)(5).

⁴⁶ 8 C.F.R. §§ 292.1(a)(4), 1292.1(a)(4).

⁴⁷ 8 C.F.R. §§ 292.2, 1292. See also EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FORM EOIR-31, available at <http://www.justice.gov/eoir/eoirforms/eoir31.pdf>.

⁴⁸ See, e.g., Sam Dolnick, *Removal of Priest's Cases Exposes Deep Holes in Immigration Courts*, N.Y. TIMES, July 7, 2011.

immigrants by certain non-lawyers, is exacerbated rather than ameliorated when federal government standards fail to ensure adequate training and oversight of non-lawyers providing direct services to vulnerable immigrants.

On February 17, 2012, the Executive Office for Immigration Review (EOIR)—the agency within the U.S. Department of Justice that administers the nation’s immigration court system (including the BIA) and which extends recognition to qualified non-profit organizations and accredits their non-lawyer representatives who practice before both EOIR and DHS—published a notice of meeting in the Federal Register.⁴⁹ The notice stated that EOIR is reviewing and considering amendments to the regulations governing the recognition of organizations and accreditation of representatives, that it was seeking public comment on issues affecting these regulations, and that it would hold two public meetings to discuss these regulations. The first meeting, held in Washington, D.C. and via teleconference on March 14, 2012, was limited to a discussion of the recognition of organizations. The second meeting and teleconference, held on March 21, 2012, focused on issues addressing the accreditation of representatives.

For each meeting, an agenda of issues—but not the actual regulations, which have not yet been published and may or may not have been drafted—was provided in the published notice. To facilitate EOIR’s ability to respond to comments at the meetings, the agency requested written answers to the questions set out in the notice no later than March 6, 2012. This subcommittee submitted some general recommendations in advance of the meetings, in a letter dated March 6, 2012, which is attached. The agency also indicated that it would accept further comments after both meetings, due by March 30, 2012. This subcommittee wrote a follow-up letter, dated March 30, 2012, addressing some specific issues that generated discussion during the second meeting, mostly with respect to the subcommittee’s recommendations regarding training and testing of accredited representatives. That letter is also attached. The agency has indicated that it will incorporate our written submissions into the public record of both meetings.

As set out further in this subcommittee’s two letters to EOIR, our major concerns about the existing program of granting recognition to qualified organizations relate to whether such organizations possess or have access to the following:

- (1) Controls on monitoring its capacity (i.e., knowing when to stop taking on new cases);
- (2) Supervision and quality control;
- (3) Ability to monitor and ensure compliance with deadlines;
- (4) A mission statement related to client rights and responsibilities;
- (5) Training for new staff and on-going training for existing staff;
- (6) Access to timely updates on legal developments;
- (7) Adequate financial controls;
- (8) Liability and malpractice insurance; and
- (9) Case management software and infrastructure.

⁴⁹ 77 Fed. Reg. 9590 (Feb. 17, 2012). A copy of the notice is also reproduced below.

With respect to individual accredited representatives, this subcommittee's primary concerns relate to the need for mechanisms that ensure adequate training and supervision of such representatives, and we have preliminarily recommended that EOIR do the following:

- (1) Develop a training curriculum that all prospective accredited representatives be required to complete (with an exemption for pre-existing accredited representatives until such time as they are required to seek re-accreditation);
- (2) Develop an exam that would test prospective representatives' understanding of the topics covered by the basic curriculum and test their legal analysis and writing skills; and
- (3) Mandate CLE-type training in immigration law on a periodic basis for all accredited representatives as a requirement for being re-accredited (currently, accredited representatives must be re-accredited every three years).

EOIR is expected to publish a proposed rule setting out its intended reforms sometime during the summer of 2012. Accordingly, this subcommittee's major focus at the beginning of Year 2 of the Special Committee's mandate will be to develop comments for submission to EOIR during the comment period. Commenting on EOIR's proposed regulations presents the Special Committee with a unique opportunity to contribute thoughtfully to the improvement of the current recognition and accreditation system to ensure not only the availability but also the quality of legal services provided to low-income and indigent immigrants. To this end, the entire Special Committee will engage in a discussion of the changes EOIR is proposing to make.

This subcommittee recognizes that an association of lawyers might be inclined to weigh in against the existence of a program that allows non-lawyers to represent clients in legal matters. However, it is this subcommittee's opinion—given the lack of adequate attorney resources in many parts of the country (including vast areas of upstate New York) to meet the need for representation in immigration matters, the valuable services currently being rendered to low income immigrants by many of the recognized agencies, and the fact that this program has been in existence for decades and is unlikely to be abolished just because one or more bar associations express disapproval of it—that the Special Committee should seize the opportunity to contribute recommendations for improving the current system in ways that enhance the quality of representation that is currently being provided, and which undoubtedly will continue to be provided, by non-attorneys to immigrants in New York State and around the country.

Proposed Rules

Federal Register

Vol. 77, No. 33

Friday, February 17, 2012

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

8 CFR Part 1292

[EOIR Docket No. 176]

RIN 1125-AA72

Recognition and Accreditation

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of meeting.

SUMMARY: The Executive Office for Immigration Review (EOIR) is reviewing and considering amendments to the regulations governing the recognition of organizations and accreditation of representatives who appear before EOIR. EOIR seeks public comment on issues affecting these regulations and will host two open public meetings to discuss these regulations. The first meeting will be limited to a discussion of the recognition of organizations and the second will address accreditation of representatives.

DATES: *Dates and Times:* The first meeting will be held on Wednesday, March 14, 2012 at 1 p.m. The second meeting will be held on Wednesday, March 21, 2012 at 1 p.m.

ADDRESSES: The meetings will be held at 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041.

FOR FURTHER INFORMATION CONTACT: To RSVP for the meeting: Lauren Alder Reid, Counsel for Legislative and Public Affairs, 703-305-0289, PAO.EOIR@usdoj.gov. For each meeting, attendance will be limited to the first forty (40) individuals to RSVP. EOIR will also offer a conference call option for those who cannot physically attend the meeting. To attend the meeting via conference call, please RSVP with the name(s) of the attendee(s), the attendee's organization, and an email address where instructions may be sent for accessing the conference call.

SUPPLEMENTARY INFORMATION:

Background

EOIR is reviewing and considering amendments to the regulations at 8 CFR 1292.2 governing the recognition of organizations and accreditation of representatives who appear before EOIR. EOIR will be hosting two open public meetings to discuss these regulations. The purpose of these meetings is to solicit the views of non-governmental organizations and other interested members of the public regarding potential amendments to these regulations.

Agenda for March 14, 2012, Meeting

The first meeting, which will be held on March 14, 2012, will focus on issues addressing the recognition of organizations. An agenda for the first meeting is listed below.

1. *Introductions.*
2. *Discussion of required documentation to establish eligibility for recognition.* What documentation must an organization be required to provide in order to establish that it meets the eligibility requirements for recognition? For example, should EOIR require the organization to submit incorporation or tax documents to prove non-profit status?
3. *Discussion of fraud prevention.* EOIR is committed to preventing fraud and is mindful that the recognition and accreditation program may be susceptible to abuse. How can EOIR both prevent abuse of the system by organizations that may seek to exploit or misuse their recognized status, and encourage the participation of legitimate organizations in the program?
4. *Discussion of nominal fees.* Currently, recognized organizations are allowed to charge only a "nominal fee" for their services in order to ensure that they are serving a non-profit, religious, charitable, or social service purpose. *See* 8 CFR 1292.1(a)(1). Should recognized organizations be able to charge more than a nominal fee for their services? If so, under what circumstances? Would a system, in which an organization's eligibility for recognition is determined based on the percentage of its revenue from client fees, be an effective measure to ensure that the recognized organization is serving a non-profit religious, charitable, or social service purpose?
5. *Discussion of withdrawal of recognition.* Are the current procedures

for withdrawal of recognition for an organization effective? *See* 8 CFR 1292.2(c). If not, how can the process be improved?

6. *Discussion of definition of "low-income."* EOIR is considering defining "low-income" by using percentages of the Federal Poverty Guidelines amounts. For example, the Legal Services Corporation provides that the income of service recipients may not exceed 125% of the current official Federal Poverty Guidelines amounts. *See* 45 CFR part 1611. How should "low-income" be defined?

7. *Adjourn.*

Agenda for March 21, 2012 Meeting

The second meeting, which will be held on March 21, 2012, will focus on issues addressing the accreditation of representatives. An agenda for the second meeting is listed below.

1. *Introductions.*
2. *Discussion of required training for accredited representatives.* In order to ensure that accredited representatives maintain sufficient knowledge in immigration law and procedure to represent individuals adequately before the Department of Homeland Security and EOIR, should EOIR require that accredited representatives fulfill an annual immigration training requirement similar to a Continuing Legal Education (CLE) requirement for attorneys? What would be the appropriate amount and type of annual training for accredited representatives (e.g., requiring fifteen hours of CLE annually as many state bar associations require for licensed attorneys)?
3. *Discussion of fraud prevention.* EOIR is committed to preventing fraud and mindful that the recognition and accreditation program may be susceptible to abuse. How can EOIR both prevent abuse of the system by individuals who may seek to exploit or misuse their accredited status, and encourage the participation of legitimate individuals in the program?
4. *Discussion of adequate supervision.* Generally, accredited representatives are non-attorneys who provide advice and representation to individuals. What is the best way to ensure that accredited representatives receive adequate supervision in order to provide effective assistance and representation?
5. *Adjourn.*

Public Participation

EOIR welcomes responses to these questions in the form of written submissions, as well as in-person discussion at each respective meeting. To facilitate EOIR's ability to respond to comments at the meetings, the agency believes it will be most helpful to receive written answers to the questions before the meetings. Therefore, EOIR encourages parties to submit written answers no later than 5 p.m. on Tuesday, March 6, 2012, by email to PAO.EOIR@usdoj.gov. However, EOIR will also accept comments and written responses after the meetings. Final written submissions are due no later than 5 p.m. on Friday, March 30, 2012, by email to PAO.EOIR@usdoj.gov.

The meetings are open to the public, but advance notice of attendance is required to ensure adequate seating. Persons planning to attend should notify Lauren Alder-Reid, Counsel for Legislative and Public Affairs, 703-305-0289, PAO.EOIR@usdoj.gov. For each meeting, participation will be limited to the first forty (40) individuals to RSVP, with an additional conference call option available.

Dated: February 7, 2012.

Lauren Alder-Reid,

Counsel for Legislative and Public Affairs.

[FR Doc. 2012-3725 Filed 2-16-12; 8:45 am]

BILLING CODE 4410-30-P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150-AJ05

[NRC-2011-0221]

List of Approved Spent Fuel Storage Casks: HI-STORM 100, Revision 8

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is proposing to amend its spent fuel storage cask regulations by revising the Holtec International HI-STORM 100 dry cask storage system listing within the "List of Approved Spent Fuel Storage Casks" to include Amendment No. 8 to Certificate of Compliance (CoC) No. 1014. Amendment No. 8 adds a new multipurpose canister (MPC)—68M to the approved models currently included in CoC No. 1014 with two new boiling water reactor fuel assembly/array classes, and a new pressurized water reactor fuel assembly/class to CoC No.

1014 for loading into the MPC-32. In addition, the amendment makes several other changes as described under the "Background" heading in the **SUPPLEMENTARY INFORMATION** section of this document.

DATES: Submit comments by March 19, 2012. Comments received after this date will be considered if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Please include Docket ID NRC-2011-0221 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods:

- *Federal rulemaking Web site:* Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2011-0221. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668, email: Carol.Gallagher@nrc.gov.

- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

- *Email comments to:* Rulemaking.Comments@nrc.gov. If you do not receive a reply email confirming that we have received your comments, contact us directly at 301-415-1677.

- *Hand-deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. EST Federal workdays (telephone: 301-415-1677).

- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

FOR FURTHER INFORMATION CONTACT: Gregory Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone: 301-415-6445, email: Gregory.Trussell@nrc.gov.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document using the following methods:

- *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by email to PDR.Resource@nrc.gov.

- *Federal Rulemaking Web Site:* Public comments and supporting materials related to this proposed rule can be found at <http://www.regulations.gov> by searching on Docket ID NRC-2011-0221. For additional information, see the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register**.

Procedural Background

This rule is limited to the changes contained in Amendment No. 8 to CoC No. 1014 and does not include other aspects of the HI-STORM 100 dry storage cask system. Because the NRC considers this action noncontroversial and routine, the NRC is publishing this proposed rule concurrently as a direct final rule in the Rules and Regulations section of this issue of the **Federal Register**. Adequate protection of public health and safety continues to be ensured. The direct final rule will become effective on May 2, 2012. However, if the NRC receives significant adverse comments on the direct final rule by March 19, 2012, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments received in response to



SPECIAL COMMITTEE ON IMMIGRATION REPRESENTATION

JOJO ANNOBIL

Committee Co-Chair
The Legal Aid Society
199 Water Street
New York, NY 10038
Tel: (212) 577-3300
Fax: (212) 509-8761
jannobil@legal-aid.org

JOANNE MACRI

Committee Co-Chair
Criminal Defense Immigration Project
New York State Defenders Association
194 Washington Avenue, Suite 500
Albany, NY 12210
Tel: (518) 465-3524
Fax: (518) 465-3249
jmacri@nysda.org

March 6, 2012

VIA EMAIL: PAO.EOIR@usdoj.gov

Lauren Alder-Reid
Counsel for Legislative and Public Affairs
U.S. Department of Justice
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: Mar. 14 and Mar. 21, 2012 Meetings on Recognition of Organizations and Accreditation of Representatives Who Appear Before the EOIR

Dear Ms. Alder-Reid,

In 2011, the New York State Bar Association formed the Special Committee on Immigration Representation to address the need for quality immigration legal representation in New York State. A working group within the Special Committee's Subcommittee on Quality and Standards has been charged with examining the BIA's recognition and accreditation process as it affects the provision of immigration legal services in New York State.

The NYSBA welcomes EOIR's invitation to participate in the discussion of existing regulations and proposed amendments governing the recognition of organizations and accreditation of representatives and would like to submit the following answers and recommendations – outlined below – for consideration at the March 14 and March 21 meetings.

MARCH 14, 2012 MEETING RE: RECOGNITION OF ORGANIZATIONS

1. DOCUMENTATION REQUIRED TO ESTABLISH ELIGIBILITY FOR RECOGNITION.

We agree that EOIR should require incorporation or tax documents to prove non-profit status. Recognized organizations should also be required to submit – on a periodic basis (for example, every three years) – information regarding who is on staff, in what capacity they serve, the office locations where services are being provided, etc.

EOIR should create a mechanism for organizations to submit address changes and other updated information (for example, a form similar to Form AR-11 that the organization would be required to file periodically, perhaps with a low filing fee to help fund EOIR's processing of the information).

2. FRAUD PREVENTION

The development of a re-recognition process and on-going monitoring of individual representatives' competence (to be discussed further at the March 21 meeting) will help prevent fraud.

EOIR should establish a Hotline to report possible fraud or other abuses by the recognized agencies and accredited representatives, and all recognized agencies and accredited representatives shall be required to provide the Hotline number to clients and to post the Hotline number prominently in their offices. The Hotline number should also be posted in immigration courtrooms and USCIS local offices.

Clients must be informed of their rights and responsibilities through the use of retainers and/or a bill of clients' rights that is prominently displayed in the offices of each accredited agency. Fee schedules and the fee waiver/fee reduction policy must be posted prominently in the offices of each accredited agency.

Recognized agencies should be required to maintain liability and malpractice insurance and to develop and post client complaint policies.

3. NOMINAL FEES & DEFINITION OF LOW INCOME

"Nominal fees" can be expanded to "reasonable fees," but "reasonable fee" should be clearly defined and EOIR should also require that:

1. Part of the additional revenue generated be used to train accredited representatives, purchase subscriptions to legal resources (such as Bender's Immigration Law and Procedure, Fragomen's Immigration Procedures Handbook, Kurzban's Immigration Law Sourcebook and Interpreter Releases), purchase case management software with a tickler system, and purchase liability and malpractice insurance.
2. Recognized agencies submit fiscal reports on a regular basis in order to verify that client fees are not used to generate a profit.
3. Recognized agencies post their fee schedules prominently in their reception areas, post them on-line, and provide a copy to each client.
4. Recognized agencies charge "reasonable fees" based on a sliding fee scale to "low income" individuals who cannot afford private representation (where low income is defined as 200% of the Federal Poverty Guidelines) and ensure that fee waivers are available to destitute individuals who are homeless, receive federal or state means-tested benefits, or whose household income is below the Federal Poverty Guidelines.

4. WITHDRAWAL OF RECOGNITION

EOIR should develop and implement a regular process for agency re-recognition – perhaps every three or five years – similar to the re-accreditation process that is already in place for individual representatives.

In order to be recognized and re-recognized, agencies should provide EOIR information regarding:

1. Capacity:
 1. How many attorneys, accredited representatives, paralegals, administrative assistants and managers are on staff.
 2. Job descriptions for each position.

2. Fee schedule and waiver/fee reduction policy.
 3. Supervision and quality control policies, including:
 1. Organizational chart and supervisory structure.
 2. If more than one office, how is staff in each office supervised.
 3. Case selection criteria.
 4. Referral policy.
 5. Case load monitoring policy.
 6. Policy for maintaining client files and case notes.
 7. Ability to monitor and ensure compliance with client-related deadlines.
 8. If no immigration attorney is on staff, evidence of access to supervision/consultation with immigration attorneys in private practice, or at other non-profit agencies, or access to technical assistance from a membership organization (such as CLINIC).
 4. Retainer agreement and/or client bill of rights and responsibilities.
 5. Training policy.
 6. Confidentiality policy.
 7. Access to legal materials and timely legal updates.
 8. Fiscal reports (including revenue and expense reports and sources of funding).
- EOIR should establish a monitoring mechanism, ideally consisting of both a Hotline for clients and other practitioners to report abuses by recognized agencies and accredited representatives, and a site visit process.

MARCH 21, 2012 MEETING RE: ACCREDITATION OF REPRESENTATIVES

1. REQUIRED TRAINING FOR ACCREDITED REPRESENTATIVES

EOIR should develop a basic curriculum that individuals must complete in order to initially qualify for accreditation. In addition, individuals who complete the curriculum must take a test – also developed by EOIR – and achieve a certain minimum score in order to qualify for accreditation.

The curriculum and test for those who apply for full accreditation with the BIA would include topics related to representation in immigration removal proceedings, and training on legal research and writing.

EOIR should develop and implement ongoing training requirements for accredited representatives, similar to CLE requirements for attorneys. Accredited representatives would have to present evidence that they completed these training requirements in order to be re-accredited. Existing accredited representatives should be exempt from completing the basic curriculum, provided that, the first time they seek re-accreditation after these changes are implemented, they pass the basic curriculum test in order to qualify for re-accreditation. Thereafter, existing accredited representatives would be subject to ongoing training requirements.

All individuals who seek accreditation and re-accreditation should be required to provide writing samples that evidence their ability to write persuasively and cogently. Individuals who seek full accreditation must demonstrate an ability to apply legal analysis to fact patterns.

2. FRAUD PREVENTION

Ongoing training requirements and testing will help prevent the provision of services by practitioners who lack the competency and knowledge to provide quality legal services, and who engage in the representation of immigrants solely to take advantage of vulnerable immigrants. EOIR should establish a Hotline to report possible fraud or other abuses by the recognized agencies and accredited representatives, and all recognized agencies and accredited representatives should be required to provide the Hotline number to clients and to post the

Hotline number prominently in their offices. The Hotline number should also be posted in immigration courtrooms and USCIS local offices.

3. ADEQUATE SUPERVISION

Each agency should be required to demonstrate how each of the individuals for whom it seeks accreditation or re-accreditation will be supervised in a manner that ensures quality control.

Standards should include:

1. The creation of case caps in order to monitor caseloads (perhaps by type of case – for example, higher limits on I-90s or stand-alone I-765s, than on U visa petitions and removal cases).
2. Demonstrated access to attorney supervision/consultation (if no immigration attorney on staff, access to supervision/consultation with immigration attorneys in private practice, or at other non-profit agencies, or access to technical assistance from a membership organizations, such as CLINIC).
3. Standard policy for monitoring and ensuring compliance with client-related deadlines.
4. Standard policy for receiving and addressing client complaints.

Respectfully Submitted,

New York State Bar Association
Special Committee on Immigration Representation
Subcommittee on Quality and Standards

By: Joanne Macri and Jojo Annobil
Co-Chairs
Special Committee on Immigration Representation

Alina Das and Jan H. Brown
Co-Chairs of the Subcommittee on Quality and Standards

Comments prepared by
Julie Dinnerstein, Raluca Onciou and Careen Shannon
on behalf of the Subcommittee on Quality and Standards



SPECIAL COMMITTEE ON IMMIGRATION REPRESENTATION

JOJO ANNOBIL

Committee Co-Chair
The Legal Aid Society
199 Water Street
New York, NY 10038
Tel: (212) 577-3300
Fax: (212) 509-8761
jannobil@legal-aid.org

JOANNE MACRI

Committee Co-Chair
Criminal Defense Immigration Project
New York State Defenders Association
194 Washington Avenue, Suite 500
Albany, NY 12210
Tel: (518) 465-3524
Fax: (518) 465-3249
jmacri@nysda.org

March 30, 2012

VIA EMAIL: PAO.EOIR@usdoj.gov

Lauren Alder-Reid
Counsel for Legislative and Public Affairs
U.S. Department of Justice
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Re: Mar. 14 and Mar. 21, 2012 Meetings on Recognition of Organizations and Accreditation of Representatives Who Appear Before the EOIR

Dear Ms. Alder-Reid,

Thank you very much for affording stakeholders the opportunity to participate in the recent public meetings on the recognition of organizations and accreditation of representatives who represent immigrants before the Executive Office for Immigration Review. On behalf of the New York State Bar Association's Special Committee on Immigration Representation, we are pleased to submit these follow-up comments on some specific topics that were discussed during those meetings. Please note that while these recommendations by the Subcommittee on Quality and Standards have not yet been adopted by the full Committee, we are submitting them now in order to comply with your March 30 deadline.

In order to improve the quality of services provided to immigrants by accredited representatives, we renew all of the recommendations we submitted to EOIR before the public meetings, but will focus our present comments on our recommendation that EOIR develop a basic curriculum that individuals must complete in order to qualify for initial accreditation. Individuals who complete the curriculum should be required to take an exam (also developed by EOIR, with input from stakeholders) and achieve a certain minimum score in order to qualify for accreditation. The exam should measure knowledge of the basics of immigration law and procedures as well as legal analysis and writing ability.⁵⁰ Finally, EOIR should develop and implement ongoing

⁵⁰ We stand by our original recommendation that applicants for BIA accreditation should be required to demonstrate legal writing skills. However, to reduce the burden on applicants and in an effort to combat fraud (i.e., because there is no guarantee that writing samples are in fact prepared by the applicant seeking accreditation), we recommend

training requirements for accredited representatives, similar to continuing legal education (CLE) requirements for attorneys.

Curriculum

The curriculum and exam for those who apply for both partial and full accreditation should include an overview of the U.S. immigration system, specific training on the types of matters typically handled by accredited representatives (such as family petitions, consular processing, adjustment of status, removal of conditions on residence, naturalization, inadmissibility/deportability grounds and waivers, temporary protected status, asylum applications, Violence Against Women Act (VAWA) self-petitions, Special Immigrant Juvenile (SIJ) petitions, T and U visa petitions, etc.), and training on legal research and writing. The exam (discussed further below) should include fact-patterns that test legal analysis and writing skills.

The curriculum and exam for those who apply for full accreditation should include all of the above and, in addition, should include topics related to representation of immigrants in removal proceedings.

To mitigate the burden on both EOIR and on individuals seeking accreditation, established, EOIR-recognized organizations that already provide extensive in-house training to their staff should be permitted to submit their curriculum and training materials to EOIR and have them certified by EOIR as satisfying the curriculum requirement. Thereafter, individuals who complete the training (and who submit proof of successful completion), take the basic curriculum exam and achieve the prescribed minimum score could be certified as having satisfied the initial training requirement.

Existing accredited representatives should be exempt from completing the basic curriculum, provided that, the first time they seek re-accreditation after these changes are implemented, they pass the basic curriculum exam in order to qualify for re-accreditation. Thereafter, existing accredited representatives would be subject to ongoing training requirements. EOIR should continue the practice of asking USCIS to provide feedback on the quality of representation previously provided by accredited representatives and should develop a mechanism for measuring performance of fully-accredited representatives who practice before the immigration courts and the BIA. Feedback from USCIS and EOIR on past performance should be a factor in the decision to re-accredit representatives.

Testing

A program which essentially permits non-lawyers to engage in the practice of law before the federal government should only extend the privilege to individuals who meet an established level of competence, and an exam that is administered to all persons seeking accreditation—based on a standardized curriculum—is the fairest, most objective way of measuring such competence. Moreover, mandating an exam will help prevent pro forma participation in training sessions and

incorporating a legal writing component into the exam instead of requiring the submission of previously-prepared writing samples. In addition, applicants should be given the opportunity to provide writing samples to supplement their application for accreditation.

ensure that participants meet a minimum level of knowledge and proficiency. Testing legal writing and analysis can also provide a trustworthy method for measuring required skills.

EOIR might also consider outsourcing the curriculum development and test administration function to recognized organizations, and award grants that would allow such organizations to provide classes and testing to individuals who are seeking accreditation in order to work with small EOIR-recognized organizations that do not have the resources to develop formal training materials and classes of their own.

Legal Analysis and Writing Skills

All individuals who seek accreditation and re-accreditation should be required to provide evidence of their ability to write persuasively and cogently, including the ability to apply legal analysis to fact patterns. Several participants in the March 21, 2012 meeting suggested that a writing sample requirement would be overly burdensome. It is a fact, however, that even partially accredited representatives typically handle cases requiring significant, complicated and persuasive writing, including U visa petitions, VAWA self-petitions and affirmative asylum applications, as well as appeals and motions to reopen or reconsider. It is impossible to put together such applications and petitions competently, or to engage in motion practice, without advanced writing skills.

As discussed above, these important skills can be measured as part of the basic curriculum exam if the requirement to submit writing samples seems onerous. Measuring these skills as part of the exam may also be a more trustworthy method. Therefore, rather than requiring applicants to submit a writing sample, the required exam could include some brief hypotheticals about which applicants would be asked to write proposed solutions based on relevant law. In addition to the exam, however, applicants for re-accreditation should also have the opportunity to submit writing samples.

Ongoing Training

At the March 21 meeting, there seemed to be a broad consensus that some type of ongoing training or continuing education requirement was appropriate. With this in mind, it seems clear that an agency cannot mandate “ongoing” training without first having mandated some kind of standard initial training, i.e., the curriculum proposed above.

Ongoing training can take many forms, and the requirement could be modeled on the CLE requirements for attorneys required by most state bars. Fulfillment of a designated number of hours of ongoing training should be a requirement for individuals to be re-accredited every three years. EOIR-recognized organizations with robust training programs could be certified to provide ongoing training classes both in-house and to accredited representatives working for other organizations, and could be authorized to issue certificates of completion to participants.

Conclusion

Nobody who is concerned about the lack of quality representation available to indigent immigrants wants to erect more barriers to persons in need of such representation. On the contrary, the recognition and accreditation program owes its very existence to the longstanding shortage of qualified immigration lawyers, and the point of revising the EOIR’s regulations

should be to draw positive attention to the existence of the program, improve the quality of representation provided by accredited representatives, encourage additional organizations and individuals to become recognized and accredited, and impede both fraud by unscrupulous persons who would exploit vulnerable immigrants and substandard representation by well-intentioned but inexperienced service providers with limited knowledge of the complexities of immigration laws and procedures.

The bottom line is that encouraging more agencies to become recognized and more individuals to become accredited should not mean lowering the standards for representing poor immigrants. One participant in the March 21 meeting worried that some of our recommendations exceed what is required of lawyers who represent immigrants. To that we respond that the poor quality of representation provided by many members of the immigration bar should not be a model for the high standard of representation that all EOIR-accredited representatives who are granted the privilege of representing immigrants should be expected to provide to their clients.

Respectfully Submitted,

New York State Bar Association
Special Committee on Immigration Representation
Subcommittee on Quality and Standards

By: Joanne Macri and Jojo Annobil
Co-Chairs
Special Committee on Immigration Representation

Alina Das and Jan H. Brown
Co-Chairs of the Subcommittee on Quality and Standards

Comments prepared by
Julie Dinnerstein, Raluca Onciou and Careen Shannon
on behalf of the Subcommittee on Quality and Standards

Report of the Subcommittee on Underserved Areas of Upstate New York

Recognizing that the immigration representation crisis is a “crisis of both quality and quantity,”⁵¹ and that the “current demand for indigent removal-defense in New York exceeds the supply of such services,”⁵² the New York State Bar Association’s (NYSBA) Special Committee on Immigration Representation (Special Committee) is currently exploring ways to resolve the acute shortage of attorneys providing *pro bono* immigration representation in upstate New York and to increase and improve the quality of representation in removal proceedings in New York State.

In accordance with this mandate, the Subcommittee on Underserved Areas of Upstate New York has embarked upon an initial review of the current status of *pro bono* immigration representation for detained immigrants referred to immigration court while serving a term of state imprisonment. By focusing our initial efforts on improving representation for this specific “underserved” population of immigrants, the subcommittee hopes to gain some insight into the factors that contribute to this crisis in immigration representation and to develop a series of recommendations that will serve to address this crisis, as it exists, for both detained and non-detained immigrants across the state.

A Review of the Institutional Removal Program

Subcommittee members met with Mr. Anthony Annucci, Executive Deputy Commissioner of the New York State Department of Corrections and Community Supervision (NYS DOCCS) and teleconferenced with Mr. David Clark, NYS DOCCS Chief, Special Projects Unit Program Planning, Research and Evaluation on July 19, 2011 at the NYS DOCCS Campus in Albany, New York. As part of this review process, subcommittee members also met with Immigration Judge Roger Sagerman, of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR)⁵³ on August 10, 2011 and observed in-person and video-conferenced master calendar and merits hearings at the Downstate Correctional Facility in Fishkill, New York. This subcommittee continues to gather statistical information and data from NYS DOCCS, the EOIR and the Immigration and Customs Enforcement (ICE) who are responsible for identifying noncitizen DOCCS inmates who may be subject to removal from the United States.⁵⁴

Section 238(a) of the Immigration and Nationality Act (INA), as amended, allows removal proceedings to be conducted at federal, state, and local prisons for noncitizens convicted of

⁵¹ See The New York Immigrant Representation Study, *supra* note 1, at 1.

⁵² *Id.* at 360.

⁵³ The primary mission of the EOIR is to “adjudicate immigration cases by fairly, expeditiously, and uniformly” interpreting and administering U.S. immigration laws. Under delegated authority from the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings under the supervision of the Office of the Chief Judge. See EOIR published mission statement at <http://www.justice.gov/eoir/>; also see 8 C.F.R. §§1003.0(a), 1003.9(b).

⁵⁴ Aliens convicted of certain offenses or of unlawful presence in the United States are subject to removal as described in sections 237 (i.e., grounds of deportation) and 212 (i.e., grounds of exclusion) of the Immigration and Nationality Act of 1952, as amended, (the “Act”), 8 U.S.C. §§ 1101 et seq. (1988 & Supp. IV 1992) (INA). See INA §237; 8 U.S.C. 1227; INA §212; 8 U.S.C. §1182.

crimes and serving jail sentences.⁵⁵ This program is known as the Institutional Removal Program (IRP).⁵⁶ The U.S. Department of Homeland Security (DHS) in conjunction with the ICE officials, (i.e., through the agency's Criminal Alien Program (CAP)), have the authority to expel a noncitizen ordered removed by an immigration judge upon release from criminal incarceration.⁵⁷ With the passage of the Immigration Reform and Control Act of 1986 (P. L. No. 99-603), Congress made the deportation of noncitizens convicted of certain crimes an enforcement priority.⁵⁸

The IRP is a national program established in 1988.⁵⁹ Although it was originally intended to focus on the removal of noncitizens with “aggravated felony” convictions,⁶⁰ the list of criminal immigration offenses to be included in the IRP has expanded, as has the list of “aggravated felony” offenses following the enactment of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996.⁶¹ Under current U.S. immigration laws, the Attorney General is required, “[i]n the case of an alien who is convicted of an offense which makes the alien subject to deportation ... [to] begin any deportation proceeding as expeditiously as possible after the date of the conviction.”⁶² The mission of the IRP has remained unchanged since inception and seeks: (1) to identify foreign-born inmates upon their admission to federal, state, or county/local incarceration; (2) to further identify the subset of foreign-born inmates who are subject to removal from the United States; and (3) to complete the immigration judicial and administrative review proceedings necessary to determine removability from the United States before the completion of the immigrant's term of imprisonment.⁶³

The Common Experience of an IRP Respondent in NYS DOCCS Custody

Currently, the IRP in New York State collaborates with the NYS DOCCS, ICE, the EOIR and the New York State Division of Criminal Justice Services (DCJS). Collectively, these entities ensure that potentially deportable noncitizens are identified and processed for removal proceedings, afforded an opportunity to appear before an immigration judge and, if ordered removed, physically expelled from the United States immediately upon release from state

⁵⁵ INA § 238(c); 8 U.S.C. § 1228(a).

⁵⁶ The mission of the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) IRP “includes the detection, apprehension, and removal of aliens unlawfully present in the United States, particularly those involved in criminal activity.” See Office of the Inspector General Audit Report, “Immigration and Naturalization Service Institutional Removal Program, Report No. 02-41, (Sept. 2002) at <http://www.justice.gov/oig/reports/INS/a0241/intro.htm>.

⁵⁷ INA §241(a)(4)(A); 8 U.S.C. §1231.

⁵⁸ See CRS Report RL-40257, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by Marc R. Rosenblum & William A. Kandal (2011), at http://www.fas.org/blog/secretcy/2011/11/crs_criminal_alien.html.

⁵⁹ The IRP was initially referred to as the “Institutional Hearing Program” during the former Immigration and Naturalization Service (INS). U.S. Dept. of Justice, Office of the Inspector General, “*Immigration and Naturalization Service Institutional Removal Program*,” Audit Report 02-41, (2002), at www.justice.gov/oig/reports/INS/a0241/final.pdf.

⁶⁰ An “aggravated felony” offense was introduced and defined by the Anti-Drug Abuse Act of 1988 (P. L. No. 100-690) and is currently enumerated in the INA. “Aggravated felony” offenses include a number of New York State felonies such as offenses involving murder, rape, sexual abuse of a minor, drug and firearms trafficking, fraud, deceit and tax evasion crimes involving loss exceeding \$10,000, theft, robbery, crimes of violence and perjury in which a term of one year or more of imprisonment is imposed. See INA §101(a)(43); 8 U.S.C. §1101(a)(43).

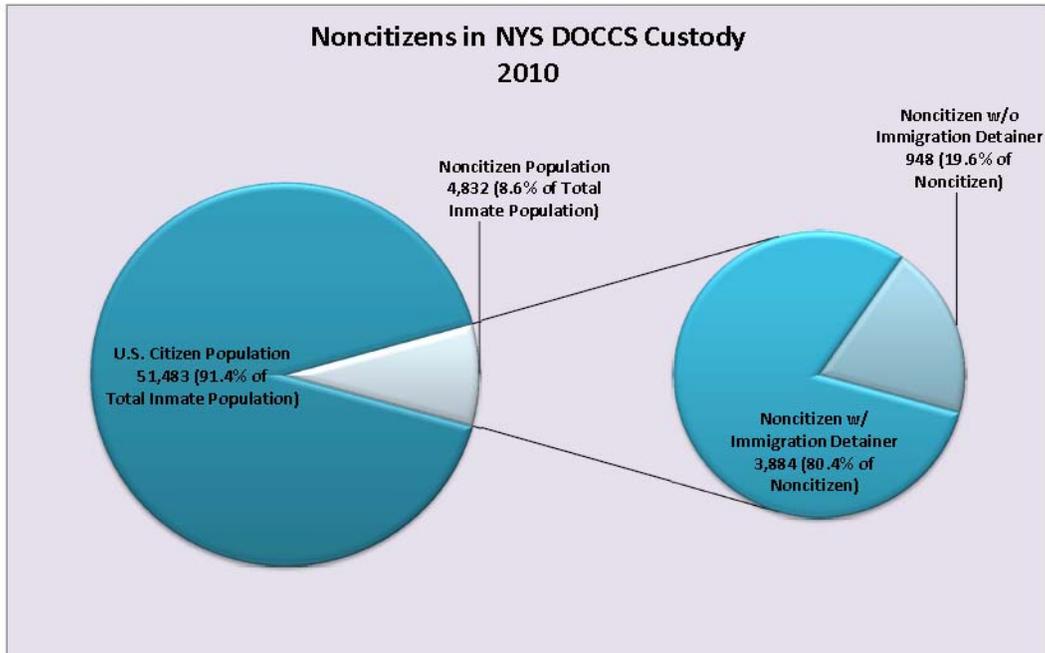
⁶¹ See Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, P. L. No. 104-208, Div. C (1996). See also CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

⁶² INA §239(d)(1); U.S.C. §1229(d)(1).

⁶³ *Id.* at 1; see also U.S. Dept. of Homeland Security, *Immigration and Customs Enforcement (ICE) Institutional Removal Program National Workload Study*, Fentress Inc. (2004), at <http://www.cis.org/articles/2009/fentress-report.pdf>.

incarceration.⁶⁴ Removal proceedings for the IRP are conducted through EOIR immigration courts located within three NYS DOCCS reception facilities - Bedford Hills,⁶⁵ Downstate⁶⁶ and Ulster⁶⁷ correctional facilities.

Figure 1:



In 2010, the total NYS DOCCS inmate population was 56,315. Of these, 4,832 (or 8.6%), were identified as aliens (i.e., noncitizens).⁶⁸ Of the 4,832 noncitizen population in custody in 2010, 3,884 (80.4%) had an immigration detainer lodged against them by DHS.⁶⁹

All inmates entering the NYS DOCCS system are initially pre-screened and processed at the Downstate Correctional Facility before they are sent to one of 62 correctional facilities located in upstate New York. Inmates arrive with a copy of their pre-sentence report, rap sheet and certificate(s) of disposition. Those identified as foreign-born during processing may be placed on a “call out” sheet and made available to ICE’s Criminal Alien Program (CAP) for possible

⁶⁴ The DCJS has also collaborated with ICE and NYS DOCCS to recently develop monitoring systems designed to ensure that potentially deportable aliens are not released to the community from state incarceration.

⁶⁵ The Bedford Hills Correctional Facility is a maximum security facility for women at 247 Harris Road, in Bedford Hills, New York, in Westchester County, about forty-seven miles north of New York City. *See Facility Listing* at <http://www.doccs.ny.gov/faclist.html>.

⁶⁶ Downstate Correctional Facility is a maximum security facility for men located at 121 Red Schoolhouse Road, in Fishkill, New York, approximately seventy miles north of New York City. *See Facility Listing* at <http://www.doccs.ny.gov/faclist.html>.

⁶⁷ Ulster Correctional Facility is a medium security facility for men located at 750 Berme Road in Napanoch, New York, about ninety-five miles north of New York City. *See Facility Listing* at <http://www.doccs.ny.gov/faclist.html>.

⁶⁸ Statistics as reported by David Clark, Chief, Special Projects Unit Program Planning, Research and Evaluation. *See also Research Report: The Foreign-Born Under Custody Population and the IRP -2010*, at http://www.DOCCS.state.ny.us/Research/Reports/2011/ForeignBorn_IRP_Report.PDF.

⁶⁹ Statistics as reported by David Clark, Chief, Special Projects Unit Program Planning, Research and Evaluation. *See also Research Report: The Foreign-Born Under Custody Population and the IRP -2010*, at http://www.DOCCS.state.ny.us/Research/Reports/2011/ForeignBorn_IRP_Report.PDF.

questioning on alienage and immigration status.⁷⁰ CAP officers lodge immigration “detainers” against those who are subject to deportation and also serve them with a charging document called the Notice to Appear (NTA).⁷¹

The NTA provides notice of the nature of the proceedings, the legal authority for the proceedings, the acts or conduct alleged to be in violation of the law and the charges against the respondent that violates the Immigration and Nationality Act.⁷² ICE officers file the NTA with the Immigration Court at Bedford, Downstate or Ulster giving the immigration court jurisdiction over the removal proceedings. The Immigration Court then sends the inmate a hearing notice that indicates the date, time and place of his/her removal proceeding and of the right to obtain counsel.⁷³ The hearing notice and NTA are also sent to NYS DOCCS to facilitate the appearance of inmates at court hearings.

The IRP respondent appears before an immigration judge either in person, via telephone or by video conferencing.⁷⁴ During the respondent’s initial appearance (i.e., referred to as a “master calendar hearing”), the immigration judge inquires if the IRP respondent requires the services of an interpreter and confirms respondent’s receipt of the NTA.⁷⁵ Additionally, the judge will inquire if the IRP respondent has retained counsel. The immigration judge is required to “advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice.”⁷⁶ The immigration judge must also “require the respondent to state then and there whether he or she desires representation.”⁷⁷ Although noncitizens in immigration proceedings have no specific right to counsel, an immigration judge must “[a]dvice the respondent of the availability of free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized pursuant to [8 C.F.R.] § 1292.2, located in the district where the removal hearing is being held.”⁷⁸ In doing so, the IRP respondent will receive a list of “Free Legal Service Providers” and be offered a brief adjournment to allow for an opportunity to retain counsel.

Often, efforts by an IRP respondent in NYS DOCCS custody to retain immigration counsel prove unsuccessful.⁷⁹ Although U.S. immigration laws provide that every person placed in

⁷⁰ In an effort to consolidate its criminal alien operations, ICE created the Criminal Alien Program (CAP) in 2007. CAP relies on access to criminal and immigration databases to ensure that all criminal aliens in federal, state and local custody are remanded to ICE before their release from incarceration. Tom Barry, *Consolidating ICE’s Criminal Alien Program*, Borderlines, (2009) at http://defendingimmigrants.org/news/article.242413-Consolidating_ICEs_Criminal_Alien_Program.

⁷¹ An immigration detainer is a document (Form I-247) that requests that a local or state law enforcement agency with custody of a noncitizen detainee notify the DHS of their intent to release the detainee so as to allow up to two business days to give DHS the opportunity to assume custody of detainee. 8 C.F.R. §287.7(a).

⁷² INA §239 (a)(1), 8 U.S.C. §1229 (a)(1).

⁷³ *Id.*

⁷⁴ EOIR Immigration Judge Roger Sagerman presides over the majority of immigration hearings conducted at all three NYS DOCCS reception facilities.

⁷⁵ According to IJ Sagerman, most of the inmates in the three reception centers hail from the New York City area and its immediate suburbs. He opines that about 95% of them speak either English or Spanish.

⁷⁶ See 8 C.F.R. § 1240.10(a)(1).

⁷⁷ *Id.*

⁷⁸ *Picca v. Mukasey*, 512 F.3d 75, 78 (2d Cir. 2008) (citing *Jian Yun Zheng v. U.S. Dep’t of Justice*, 409 F.3d 43, 46 (2d Cir. 2005)). See also 8 C.F.R. § 1240.10(a)(2) (2011).

⁷⁹ A review of the July 1, 2011, “Free Legal Service Providers” list maintained by the IRP immigration courts within NYS DOCCS has revealed that only one of the listed organizations, *Comite Nuestra Senora de Loreto Sobre Asuntos de Inmigracion*, which is a Board of Immigration Appeals (BIA) recognized organization, provides free legal assistance to inmates appearing before the Downstate immigration court. However since May 2011, this organization has stopped providing assistance because

removal proceedings has “the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,” for most IRP respondents in NYS DOCCS custody, this “privilege” is somewhat meaningless.⁸⁰ Although immigration judges are often willing to provide multiple adjournments to allow the IRP respondent an opportunity to seek counsel, there is a scarcity of available legal services and/or *pro bono* counsel willing to travel to upstate New York to provide representation.⁸¹

When representation by legal counsel or an accredited representative is unavailable, the immigration judge is left to assist the unrepresented inmate by reviewing all possible relief/waiver options from removal with respondent and provide applications necessary to seek such relief.⁸² But having an immigration judge adequately advise a *pro se* litigant of his/her legal options can often be an insurmountable task especially given the complexity of the legal issues that are often involved and the significant time constraints prevailing over most immigration courts.⁸³ Thus, without available counsel, many inmates remain unaware of their legal options and available forms of relief.

If the immigration judge determines that an unrepresented IRP respondent is eligible for relief from removal, the judge will provide the respondent with the relief application(s) and instructions necessary to apply for relief before the immigration judge. The IRP respondent is scheduled for a merits hearing, (i.e., often referred to as an “individual hearing”) upon submission of the completed relief application. The immigration judge will also give the respondent a deadline to submit documents in support of the application and a final hearing date. At the hearing, the *pro se* IRP respondent will be expected to present direct testimony and will be permitted to object to any evidence presented against him/her before the immigration court. If relief from removal is denied, the IRP respondent will be provided with a Notice to Appeal, Form EOIR-26 with instructions for filing an appeal before the Board of Immigration Appeals (BIA). In certain circumstances, the IRP respondent may file a subsequent appeal of his/her immigration matter before the federal circuit courts. Failure to file a timely appeal at either of these stages will result in a final order of removal. Subsequent to the issuance of a final order of removal, ICE will prepare for the IRP respondent’s possible immigration detention and subsequent expulsion from the United States upon his/her release from NYS DOCCS custody.

The Crisis: Recognizing the Need for Immigration Representation

The crisis resulting from a lack of immigration representation within the EOIR IRP located in NYS DOCCS is not a recent phenomenon.⁸⁴ Many barriers contribute to the unmet

the BIA has revoked the accreditation of its sole accredited representative. See Sam Dolnick, *Removal of Priest's Caseload Exposes Deep Holes in Immigration Courts*, N.Y. Times (July 7, 2011).

⁸⁰ INA §240(b)(4)(A); 8 U.S.C. §1229a(b)(4)(A).

⁸¹ See the available listing of “Free Legal Service Providers” maintained by the EOIR published in the “Legal Aid” section of each immigration court listed at <http://www.justice.gov/eoir/sibpages/ICadr.htm>.

⁸² Pursuant to 8 C.F.R. § 1240.11(a)(2) (2009), an immigration judge “shall inform the alien of his or her apparent eligibility to apply for any of the [immigration] benefits” enumerated with the INA.

⁸³ Peter L. Markowitz, *Barriers to Representation For Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 545 (2009).

⁸⁴ The New York Immigrant Representation Study reported that a total of 78% of IRP detainees were unrepresented during removal proceedings conducted in New York between October 1, 2005 and July 13, 2010. See The New York Immigrant

representation needs at the IRP. For instance, because the IRP is conducted within NYS DOCCS, a sizeable number of the IRP respondents are charged with removal based on prior felony conviction(s) (i.e., classified as “aggravated felony” offenses).⁸⁵ Noncitizens convicted of “aggravated felony” offenses are often ineligible for most common forms of relief from removal.⁸⁶ Others may be eligible for relief from removal but only based on successful analysis of complex legal arguments. It is not surprising that this limited access to relief from removal has discouraged the civil legal services community and *pro bono* counsel, whose resources are already scarce, from providing representation in IRP removal proceedings. “This does not mean, however, that the presence or absence of counsel is unimportant to the outcome of IRP cases. To the contrary, often the only chance of success in such proceedings lies in complicated legal arguments distinguishing respondents’ state convictions from the federal aggravated felony categories. It is precisely such technical legal arguments that *pro se* respondents are particularly ill-equipped to identify or articulate.”⁸⁷

Similarly, because the IRP deals exclusively with noncitizens convicted of serious crimes may also explain the paucity of representation at IRP. Few legal services providers, not for profit organizations, and attorneys have specialized knowledge of the intersection between state criminal law and federal civil immigration law.⁸⁸ Even fewer have resources available to provide direct representation in these types of removal proceedings. Because eligibility for relief from removal can depend upon a hearing on the merits pertaining to several factors including the respondent’s immigration status, length of time and residence in the U.S., criminal history and other individualized factors, there is a diminished likelihood of success in being granted relief from removal for those IRP respondents who are not represented by competent immigration counsel or accredited representatives during removal proceedings.⁸⁹ Noncitizens with prior criminal convictions will continue to be underserved in removal proceedings unless more training, support and legal resources are made available to the legal community.

Location of the IRP courts also contributes to the scarcity in available immigration representation. Noncitizens serve jail sentences in correctional facilities located throughout New York State. However, their immigration cases are heard in immigration courts that are located 70 and 95 miles from New York City, the nearest city with an active immigration bar.⁹⁰

Representation Study, *supra* note 1, at 369.

⁸⁵ Through the generous cooperation of EOIR Court Administrator, Star Pacitto, this subcommittee received EOIR IRP statistics that indicate that, in 2010 and between January and October of 2011, approximately 53% of NTA’s filed with the immigration court in Ulster and Downstate Correctional Facilities charged removability based on a prior “aggravated felony” offense as defined pursuant to INA § 101(a)(43); 8 U.S.C. § 1101(a)(43).

⁸⁶ See The New York Immigrant Representation Study, *supra* note 1, at 8. See also *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010) (aggravated felonies are “the category of crimes singled out for the harshest deportation consequences”).

⁸⁷ See The New York Immigrant Representation Study, *supra* note 1, at n.22.

⁸⁸ The immigration courts within NYS DOCCS IRP and the immigration courts in York, Pennsylvania are the only immigration courts nationwide whose pending dockets are comprised of more than 50% criminal aliens. Transactional Records Access Clearinghouse (TRAC) Report 269 (summary) at 1, at <http://trac.syr.edu/immigration/reports/269/>.

⁸⁹ According to the recent New York Immigrant Representation Study, detained respondents in removal proceedings that are scheduled in New York at the Varick Street Jail are much more likely than IRP respondents to obtain counsel: 57% of the Varick Street respondents were found to lack counsel as compared to 78% of the IRP respondents in 2011. See The New York Immigrant Representation Study, *supra* note 1 at 369.

⁹⁰ An examination of the membership list conducted in January 2012 on the American Immigration Lawyers Association (AILA) website, the preeminent immigration bar association, shows that there are only 17 members within a 50 mile radius of Ulster, the court that is the furthest from New York City and more difficult to reach. Only six of those members handle removal defense. See

Adequate representation of detained noncitizens requires an attorney/representative and possibly an interpreter to consult with and to prepare an IRP respondent for removal proceedings. In most instances, applications for relief from removal must be prepared and reviewed with clients in circumstances that are less than optimal and direct representation might not be readily available if the IRP respondent is located in a facility located several hours from the nearest active immigration legal community.⁹¹

Nevertheless, some noncitizens with criminal convictions have meritorious claims available to them.⁹² Others may have criminal convictions based on guilty pleas they entered into without competent legal advice about the immigration consequences.⁹³ The complexity of immigration law, as noted by many courts, requires that competent representation be secured.⁹⁴ Representation is especially critical, given the grave consequences of deportation, which the U.S. Supreme Court has deemed the equivalent of “banishment” or “exile.”⁹⁵

Other statistical data also demonstrates the value of legal representation in immigration matters. The New York Immigrant Representation Study found that the two most important variables for success in removal proceedings are having counsel and not being detained. The study also found that immigrants in removal proceedings with counsel have a five-fold chance of prevailing in their immigration case if they have counsel.⁹⁶ Multiple studies have also noted that represented asylum applicants are much more likely to obtain relief than *pro se* applicants and that attorney representation, or lack thereof, makes a real difference in impacting the outcome of an immigration case.⁹⁷

To his credit, Immigration Judge Sagerman recognizes the need for increasing attorney representation in the IRP courts located within NYS DOCCS. As a result, Judge Sagerman has established a monthly “*pro bono* day” when he schedules meritorious cases on the court’s master calendar at Downstate Correctional Facility.⁹⁸ Judge Sagerman hopes that by creating a periodic “*pro bono* day” on the IRP court calendar, private immigration attorneys, legal services providers and/or law school clinics would be encouraged to appear for the purposes of providing

<http://myaila.aila.org/Membership/Login.aspx?ReturnUrl=%2fdefault.aspx>. See also Hon. Denny Chin, *Representation of the Immigrant Poor: Upstate New York*, *supra* at 354.

⁹¹ See The New York Immigrant Representation Study, *supra* note 1, at 22.

⁹² See, e.g., *Batchilly v. United States*, 210 Fed. Appx. 95 (2d Cir. 2006) (denial of asylum claim by Ulster IHP IJ reversed); *Matter of Aldabesheh*, 22 I&N Dec. 983 (BIA 1999) (*pro se* detainee in Ulster eligible for withholding of removal, notwithstanding aggravated felony conviction).

⁹³ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); Sophie Feal, *The Price of Justice*, 15 Bender’s Immigration Bulletin 1327 (Oct. 1, 2010). The *McDonald* case, the subject of Feal’s article, tellingly demonstrates why a competent immigration attorney is required, even in a case that on its face appears to have some merit. See The New York Immigrant Representation Study, *supra* note 1, at 387.

⁹⁴ *Padilla v. Kentucky*, 130 S. Ct. at 1488-90 (concurrency of Alito, J. providing numerous examples of why “nothing is ever simple with immigration law”); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (comparing the complexity of immigration law to the Internal Revenue statute and the mythical labyrinth of King Minos).

⁹⁵ *Delgado v. Carmichael*, 332 U.S. 388, 390-91 (1947).

⁹⁶ See The New York Immigrant Representation Study, *supra* note 1, at 363-64.

⁹⁷ See “*Reforming the Immigration System: Proposals to Protect Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases:*” American Bar Association Committee on Immigration (January, 2010) (Executive Summary at ES-39, nn.64-67); Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 Fordham L. Rev. 579, 587 n.33 (2009). It should be noted that most, if not all, of the aliens in the IRP are ineligible for asylum due to their criminal records.

⁹⁸ Immigration Judge Sagerman continues to provide this Committee with a monthly schedule of the “*pro bono*” day docket.

pro bono screening and/or representation on an identified meritorious case. Judge Sagerman intends to continue to schedule monthly “*pro bono* days” throughout 2012.⁹⁹

Exploring Options to Improve *Pro Bono* Representation

This Committee recognizes that “[b]y volunteering their services, *pro bono* attorneys make a difference in the lives of countless low-income New Yorkers.”¹⁰⁰ The Committee is currently exploring several options in determining how to improve the delivery and quality of *pro bono* immigration representation in New York State:

Continue dialogue with NYS DOCCS/EOIR IRP to improve *pro bono* attorney access to clients. The Committee recognizes and understands the limitation of resources available to attorneys, nonprofit organizations, civil legal services and law schools in providing *pro bono* representation, especially when such representation requires travel and regular communication with a detained client to provide adequate representation. The Committee will continue a dialogue with NYS DOCCS, EOIR IRP immigration courts and ICE to explore avenues for improving *pro bono* attorneys access (i.e., in person, video-conferencing, telephone and/or Internet access) to detained clients and to the clients immigration file (i.e., often referred to as the “Alien” or “A” file).¹⁰¹

Explore ways to educate the immigrant detained community and make available current *pro se* immigration materials. The Committee is currently exploring ways to work with the EOIR Legal Orientation Program (LOP)¹⁰² and the NYS DOCCS to improve detained immigrants’ access to materials and resources (i.e., such as “Know Your Rights” presentations)¹⁰³ designed to assist *pro se* immigrants in immigration matters. The Committee is exploring ways to encourage the development of and access to *pro se* materials for detained and non-detained immigrants preparing for removal proceedings.¹⁰⁴

⁹⁹ During this subcommittee’s most recent contact with Judge Sagerman on March 16, 2012, we were advised that no *pro bono* legal representatives have arranged to appear on his “*pro bono* calendar” scheduled to date. This Committee is continuing to work with Judge Sagerman in an effort to promote the “*pro bono*” calendar among the immigration bar in New York State.

¹⁰⁰ NYSBA News Release, *Free Legal Clinics and Attorney Recruitment Drive Highlight National Pro Bono Week in New York* (quoting NYSBA President, Vincent E. Doyle III (Oct. 21, 2011), at http://www.nysba.org/AM/Template.cfm?Section=President_s_Page_Doyle&template=/CM/ContentDisplay.cfm&ContentID=56104).

¹⁰¹ The Committee wishes to thank NYS DOCCS Executive Deputy Commissioner, Anthony Annucci, and NYS DOCCS Chief, Special Projects Unit Program Planning, Research and Evaluation, David Clark, as well as EOIR Immigration Judge, Roger Sagerman, for meeting with members of this subcommittee in an effort to examine and initiate recommendations for improving the availability of *pro bono* representation and increasing the quality and quantity of legal resources and *pro se* materials to be made available to IRP respondents within NYS DOCCS custody.

¹⁰² “Since April of 2000, the Legal Orientation and Pro Bono Program has worked to improve access to legal information and counseling and increase rates of representation for immigrants appearing before the Immigration Courts and Board of Immigration Appeals (BIA). This has been carried out primarily through initiatives that facilitate access to information and create new incentives for attorneys and law students to accept *pro bono* cases. The Office of Legal Access Programs focuses on four main initiatives - the Legal Orientation Program (LOP), the BIA Pro Bono Project, the Unaccompanied Alien Children Initiative, and the Model Hearing Program.” See U.S. Department of Justice, Executive Office for Review, Office of Legal Access Programs, at <http://www.justice.gov/eoir/probono/probono.htm>.

¹⁰³ This Committee encourages the EOIR LOP to develop a video-taped “Know Your Rights” curriculum and/or training video that may be made accessible to all facilities that detain immigrants for regular viewing and we are exploring this option with the EOIR IRP program within NYS DOCCS.

¹⁰⁴ The Committee, through its co-chair, Joanne Macri and committee advisor, Karen Murtagh-Monks, Esq., Executive Director of Prisoners Legal Services of New York (PLS), are currently working with several law students of the Buffalo Law School of

Explore alternative service delivery models. The dearth of representation demonstrates that none of the existing civil legal services providers in New York State currently have the resources available to provide ongoing representation to detained immigrants in New York. As a result, our Committee is currently exploring various service delivery models to determine how best to improve the availability of *pro bono* representation in New York State. The following models are some of the programs that are currently being considered by our Committee:

a) *Pro bono Referral Program that Includes Training and Mentoring Support*

This type of legal service delivery model requires an organization or legal entity to provide free training to both volunteer lawyers and immigrants on how to prepare and present a case in immigration court. Once an attorney is trained, he/she will be placed on a list and required to provide *pro bono* representation on a case referred to the attorney by the training organization or entity. Volunteer attorneys will receive a pre-screening memo of the immigration case (i.e., a detailed analysis of the merits of a particular case). Additionally, the training organization or entity will provide the volunteer attorney with continued legal support and assistance in preparing for the removal proceedings.¹⁰⁵

b) *Law School Clinical Program Representation*

Collaboration between New York area law school immigration clinics and a *pro bono* IRP referral program could result in the referral of cases to the clinics for representation. Alternatively, law schools could also place law students, (i.e., through internship/externship placements) with attorneys and/or law firms to provide *pro bono* representation on immigration matters. Such a program would allow for law students, under the supervision of experienced immigration counsel, to have access to “live-client or other real-life practice experience” in the area of immigration law.¹⁰⁶

c) *Representation Through Immigration Fellowship and Mentoring Program*

This model would involve the creation of an immigration fellowship initiative that would provide recent law graduates and young attorneys with an opportunity to receive intensive training and mentoring from experienced immigration attorneys with the goal of supporting the underserved immigrant community and raising the standard of representation across the state.

the State University of New York (SUNY) to review existing EOIR LOP materials and to develop any additional, current *pro se* immigration materials for proposed review and consideration by the EOIR LOP and the NYS DOCCS. If accepted, these *pro se* materials will be made readily available to all detained immigrants via the on-line law libraries available in each of the 69 NYS DOCCS facilities located throughout the state. Notice of these materials will be made available in publications such as “*Pro Se*” published by PLS and the “*Public Defense Backup Center Report*” published by the New York State Defenders Association (NYSDA).

¹⁰⁵ A current example of this model is the Immigration Project of the Volunteer Lawyer’s Program of the Erie County Bar Association (VLP), which has since 1998 provided *pro se* materials and “Know Your Rights” trainings, as well as legal representation through *pro bono* volunteer lawyers who, after receiving continuing legal education from the VLP, agree to provide legal representation to detained immigrants who appear before the immigration courts at the Buffalo Federal Detention Facility in Batavia, New York. The VLP is currently funded by the EOIR LOP and the Vera Institute to provide this type of *pro bono* immigration training program.

¹⁰⁶ See Standards and Rules of Procedure for Approval of Law Schools Section of Legal Educ. and Admissions to the Bar, American Bar Assn., Standards for Approval of Law Schools, Standard 302(b)(1), (2) (2011-2012).

Fellows could be housed in accredited nonprofit organizations or civil legal service agencies throughout New York State.¹⁰⁷

d) *Bar Association Training and Mentoring Program*

This model provides for state and local bar associations to sponsor either a legal training program and/or “legal clinic” to promote attorney recruitment for *pro bono* representation. It may or may not include a mentoring component and may or may not include an agreement to participate in limited *pro bono* representation.

Our Committee will continue to explore options to improve the quality and availability of *pro bono* immigration representation in New York State to “ensure that ‘justice for all’ [is] not just a slogan but a reality.”¹⁰⁸

¹⁰⁷ This proposed initiative is modeled after the Equal Justice Works Public Defender Corps, which currently provides fellows who are being trained on complex issues involved in criminal defense representation, including but not limited to, the immigration consequences of criminal convictions for noncitizens, while providing legal representation in public defender offices throughout the country. Information on the Public Defender Corps is at <http://www.equaljusticeworks.org/post-grad/public-defender-corps>.

¹⁰⁸ NYSBA, *Free Legal Clinics and Attorney Recruitment Drive Highlight National Pro Bono Week in New York* (Oct. 21, 2011) (quoting NYSBA President, Vincent E. Doyle, III, at http://www.nysba.org/AM/Template.cfm?Section=President_s_Page_Doyle&template=/CM/ContentDisplay.cfm&ContentID=56104).

Conclusion

To strengthen the quality and availability of immigration representation, the New York State Bar Association's Special Committee on Immigration Representation (Special Committee) has proposed minimum standards (standards) of representation for attorneys and non-attorneys accredited by the Executive Office for Immigration Review (EOIR), Board of Immigration Appeals (BIA) (referred to as "accredited representatives") in order to ensure adequate legal representation in immigration proceedings. Although not binding, these proposed standards codify longstanding, approved practices and serve as practical guidelines for all attorneys and accredited representatives who represent immigrants. With the adoption of these proposed standards by the New York State Bar Association, the Special Committee will seek bar associations', legal services providers' and law schools' endorsement and adoption of the standards into the general norm of quality federal immigration practice.

The Special Committee recognizes that the pervasiveness of immigration fraud and scams perpetuated upon unsuspecting immigrants often compounds the effects of insufficient immigration legal services. In an effort to meet its goals of improving the quality and availability of immigration representation, the Special Committee will continue to explore ways to further protect immigrants against exploitation by unscrupulous individuals. The Special Committee will propose recommendations that strengthen the rules and regulations governing the unauthorized and/or unlawful practice of immigration law. The Special Committee will also educate the legal community and public on the dangers of the unlawful practice of law.

Moreover, the Special Committee recognizes that, with meaningful reform, the EOIR Recognition and Accreditation program can enhance the availability as well as the quality of legal services provided to low-income immigrants. The Special Committee will therefore discuss the soon-to-be published EOIR-proposed regulations for reforming the Recognition and Accreditation program and suggest improvements to the current system.

Furthermore, the Special Committee recognizes that there is a dearth of adequate immigration legal representation across New York State. The representation crisis is dire because of the dramatic escalation in immigration enforcement and corresponding exponential increases in detentions, and expulsions of immigrants from the United States. In recognizing that the current demand for indigent removal-defense in New York exceeds the supply of such services, the Special Committee will continue to explore viable avenues for building a cadre of mentored attorneys across New York State willing and able to provide quality *pro bono* immigration representation. In doing so, the Special Committee remains dedicated to ensuring access to quality legal representation for all immigrants.

However, without significant statutory reform or sufficient funding for highly-trained, full-time immigration law specialists, the Special Committee's Sisyphean efforts are unlikely to sufficiently improve the quality and availability of representation. Nevertheless, the Special Committee's recommendations for legal education programs and *pro bono* participation are critical components of what must be a larger effort to improve immigration justice. The Special Committee remains committed to improving the quality of representation and seeking legislative reform that will guarantee universally adequate immigration representation.